(6)

No. 01-339-CFH

CAPITAL CASE

Docketed:
August 27, 2001

Title: Terry L. Stewart, Director, Arizona Department of Corrections, Petitioner
v.
Robert Douglas Smith

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 13 2001	Petition for writ of certiorari filed. (Response due September 26, 2001)
	Sep 26 2001	Brief of respondent Robert Douglas Smith in opposition filed.
	Sep 26 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Sep 26 2001	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Oct 10 2001	DISTRIBUTED for Conference of October 26, 2001
	Oct 10 2001	Reply brief of petitioner Terry L. Stewart filed.
	Oct 24 2001	Record requested.
	Nov 9 2001	Record filed.
	Nov 14 2001	REDISTRIBUTED for Conference of November 30, 2001
	Nov 21 2001	Record filed.
	Dec 3 2001	REDISTRIBUTED for Conference of December 7, 2001
	Dec 12 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Dec 12 2001	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Dec 12 2001	Petition GRANTED. Question certified to the Supreme Court of Arizona. Judgment and further proceedings reserved pending receipt of response from the Supreme Court of Arizona. Opinion per curiam. (Detached opinion.)
		**********
	Dec 12 2001	The following certified question to the Supreme Court of Arizona: At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see State v. French, 198 Ariz. App. 119, 121-122, 7 P. 3d 128, 130-131 (2000); State v. Curtis, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see State v. Espinosa, 200 Ariz. App. 503, 505 29 P. 3d 278, 280 (2001)?
	Dec 12 2001	CERTIFIED QUESTION ISSUED to Supreme Court of Arizona with complete records from United States Court of Appeals for the Ninth Circuit and from the United States District Court for the District of Arizona. (1-envelope and 6-boxes). Also copies of certified copy mailed to the USCA for the Ninth Circuit, USDC for the District of Arizona and all counsel of record in this case.

JEP

Supreme Court, U.S.
FILED

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OFFICE OF

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

ROBERT DOUGLAS SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JANET NAPOLITANO
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

144 pp

QUESTIONS PRESENTED FOR REVIEW

CAPITAL CASE

1. In *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985), this Court held that a state court's finding that a claim has been waived under the state's rules of criminal procedure will not bar review of the claim on direct appeal to this Court if "the State has made application of the procedural bar dependent on an antecedent ruling of federal law." In *Coleman v. Thompson*, 501 U.S. 722, 741 (1991), this Court noted that it has never applied *Ake* to a federal habeas case, and the Fourth Circuit has ruled that *Ake* should not be applied in that context. The Sixth, Seventh, and Tenth Circuits have cited *Ake* in the federal habeas context, but have rejected its applicability when state courts are not required to conduct a complete merits review of a claim before dismissing it on procedural grounds. In the present case, the Ninth Circuit held that Smith's ineffective assistance of sentencing counsel claim, raised for the first time in his third state post-conviction relief proceeding, was not procedurally barred in federal habeas because the state courts engaged in a limited merits review of the claim before finding it precluded. Did the Ninth Circuit err by applying *Ake* in a way that directly conflicts with the approach followed in the Fourth, Sixth, Seventh, and Tenth Circuits?

2. Assuming *Ake* applies in federal habeas even though a state court has only engaged in a limited review of a precluded claim, did the Ninth Circuit err by (a) finding that the state court procedural rulings regarding Smith's ineffective assistance claim were unclear, (b) mischaracterizing as a "merits review" the categorization process Arizona courts employ in determining whether a claim is of the type that cannot be waived without a personal, on-the-record waiver by the defendant, and (c) refusing to certify a question to the Arizona Supreme Court to clarify a perceived ambiguity in Arizona's procedural rules?

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OPINIONS BELOW

A three judge panel of the Ninth Circuit (Judges Ferguson, Reinhardt, and Thompson) reversed the judgment of the district court and remanded for an evidentiary hearing to address the merits of Smith's ineffective assistance of counsel claim (alleged failure to adequately investigate and present evidence relating to Smith's mental condition for consideration at sentencing). Appendix A, *Smith v. Stewart*, 241 F.3d 1191 (9th Cir. 2001). Relying on *Ake v. Oklahoma*, the panel rejected the district court's procedural default finding. The panel held that Smith's ineffectiveness claim could be addressed on the merits based on its belief that (1) the state court record is unclear regarding whether the state court invoked a procedural bar when it denied the claim in Smith's third post-conviction relief proceeding, and (2) Arizona courts are required to assess the merits of a claim before determining whether to apply the state's procedural default rule.

The unreported opinion of the district court denying Smith's ineffective assistance of counsel claim appears as Appendix B. The trial court and the Arizona Supreme Court's rulings denying the claim at issue are set forth in Appendices C (M.E. 10/24/95), D (M.E. 12/20/95), and E (Order dated 5/22/96).

The Arizona Supreme Court opinions affirming Smith's and his co-defendant Joseph Lambright's convictions and sentences are reported in *State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (1983), and *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983), and appear at Appendices F and G, respectively.

STATEMENT OF JURISDICTION

The State of Arizona respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, in which the court rejected the district court's finding that Smith's ineffective assistance of counsel claim is procedurally barred. The Ninth Circuit issued its decision denying Smith's motion for rehearing and suggestion for rehearing en banc on May 15, 2001. Appendix H. The State of Arizona timely filed the petition for writ of

certiorari within 90 days of that decision. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

PROVISIONS INVOLVED

At the time Smith's federal habeas petition was filed, Section 2254 of Title 28 of the United States Code provided in pertinent part:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—
>
> (A) the applicant has exhausted the remedies available in the courts of the State; or that
>
> (B)(i) there is either an absence of available State corrective process; or the existence of
>
> (ii) circumstances exist rendering such process ineffective to protect the rights of the applicant.

Rule 32 of the Arizona Rules of Criminal Procedure, as amended in 1992, is the mechanism by which defendants pursue post-conviction relief in Arizona. Rule 32.2(a)(3) precludes consideration of claims waived in a previous proceeding, and is set forth below. The Comment to Rule 32.2(a)(3) is set forth in Appendix I.

> Rule 32.2 Preclusion of remedy
>
> a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
>
> . . .

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

STATEMENT OF THE CASE

The relevant factual and procedural history begins with facts taken from intertwined opinions by the Arizona Supreme Court addressing Smith's direct appeal (Appendix F) and that of his co-defendant Joseph Lambright. (Appendix G.) In February and March, 1980, Smith, Lambright, and Lambright's girlfriend, Kathy Foreman, took a cross-country driving trip from Texas to Florida, back to Texas, and on to Arizona. The group financed the trip by muggings and purse-snatchings, and some occasional work. During the trip, Lambright and Foreman were sexually involved, and frequently had intercourse in Smith's presence.

When the group arrived in Arizona, they camped in the mountains outside Tucson, Arizona, where Lambright and Foreman again engaged in intercourse in Smith's presence. Smith became angry and complained that Lambright had all the sex he wanted. Lambright suggested that Smith "go out and find somebody."

The next day, the three drove to Tucson and were having coffee at a restaurant when Smith again indicated he wanted a woman, and Lambright in turn discussed wanting to kill somebody "just to see if he could do it." The group drove around Tucson until they saw a young woman, Sandy Owen, hitchhiking. After they picked her up, Smith raped her in the back seat of the car.

After leaving Tucson and driving through Pinal County, the group turned off the interstate, and drove to an isolated mountain area. Smith again raped the victim, then Smith, together with Lambright and Foreman, strangled, stabbed, and bludgeoned the victim to death. They took her jewelry then piled rocks on top of her.

Smith, Lambright, and Foreman were arrested in Texas approximately a year later after a tip to police from someone who had

been told about the crime. Each of the three made incriminating statements to law enforcement officers.

The Pima County Attorneys Office granted immunity to Foreman in return for her testimony against Smith and Lambright. Smith and Lambright were tried before dual juries, and were both convicted of first-degree murder, kidnapping, and sexual assault. They were both sentenced to death for the murder count and to consecutive 21-year prison terms for the kidnapping and sexual assault counts.

Smith was appointed a new attorney, Larry Fleischman, to pursue a direct appeal. Fleischman raised several issues, but did not allege ineffective assistance on the part of Smith's trial counsel, Thomas Hippert. The Arizona Supreme Court affirmed Smith's convictions and sentences, including the death penalty. Independently reviewing Smith's death sentence, the Arizona Supreme Court found that the State had established the aggravating factor of especially cruel, heinous, or depraved based on the extreme cruelty of the crime. The court acknowledged "significant" mitigation based on testimony that Smith had polio as a small child that may have caused some physical and brain damage. The court found, as mitigation, Smith's low intelligence (his I.Q. before leaving school measured 71), and also noted Smith's troubled home life as a youth, learning difficulties in school, lack of a prior record of serious crime, remorse, Smith's favorable adjustment to a new marital and parental responsibility prior to his arrest, and the immunity accorded Kathy Foreman as further mitigation. The court found, however, that the mitigation was not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the crime.

In 1984, appellate attorney Fleishman filed a petition for post-conviction relief on Smith's behalf under Rule 32 of the Arizona Rules of Criminal Procedure. The petition contained, among other claims, an allegation of ineffective assistance of counsel—that the trial court's reliance on hearsay evidence in the presentence report had denied Smith the effective representation of counsel at sentencing. The trial court found the claim waived for lack of objection at the sentencing hearing, and meritless.

In 1987, Smith filed a counseled petition for writ of habeas corpus in the district court, resulting in a stay of execution. The habeas petition was dismissed to allow exhaustion of state remedies, and Smith's third attorney filed a second Rule 32 petition in state court. The petition, though lengthy, did not raise any claims of ineffective assistance of counsel. The trial court found all of the claims in the second Rule 32 petition precluded for failure to raise them on direct appeal or in the first Rule 32 petition.

Smith subsequently filed an amended petition for writ of habeas corpus in the district court, and he also returned to state court to file a third Rule 32 petition, in which he raised for the first time a claim of ineffective assistance of counsel at sentencing. He alleged that the waiver provisions of Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure did not apply even though he had failed to raise the claim on direct appeal or in his first two post-conviction proceedings, because each of his attorneys in the prior proceedings had been appointed to "conduct the affairs of the Pima County Public Defender's Office rather than to independently represent him." Smith argued that each attorney was thus unable to raise an ineffectiveness claim against the preceding attorney.

The trial court dismissed the petition in October 1995. The court found that Smith's argument that his previous attorneys might have chosen not to raise a meritorious ineffectiveness claim simply to avoid embarrassing a colleague was "outrageous." Appendix D. The court then found that the claims of ineffectiveness were precluded by Smith's failure to bring them previously. *Id.*

Two months later, the court revisited the claim in an order denying Smith's motion for reconsideration. Appendix E. The court again found that counsel's assertion that each of Smith's prior attorneys were representing the Public Defender's Office rather than Smith was "either outrageous or ridiculous, whichever adjective is most appropriate." The court noted that if there were some type of conflict of interest, an attorney discovering a colorable claim of ineffective assistance of counsel would be required to immediately withdraw, notify the Court that there was such a claim, and allow the Court to appoint an attorney

who did not have a conflict. "To suggest that one could wait for ten years, from 1985 to [1995], and never even examine the case to see if the client had such a claim would be an admission of gross malpractice." *Id.* The court again concluded that the ineffective assistance claims "are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a)."

Smith filed a federal petition for writ of habeas corpus, raising several claims, including the ineffective assistance of sentencing counsel claim alleged in his third state post-conviction relief proceeding. The federal district court denied the habeas petition, finding the ineffectiveness claim procedurally defaulted because "the [state] trial court found the claim[] precluded as a matter of state law." Appendix B.

Ninth Circuit Judges Ferguson, Reinhardt, and Thompson reversed that ruling and issued the opinion that underlies the instant petition for writ of certiorari. Appendix A. Citing this Court's holding in *Ake v. Oklahoma* as authority, the Ninth Circuit found that (1) Arizona courts are required to assess the merits of a procedurally barred claim before determining whether to apply the state's procedural rule of preclusion, and (2) it is unclear from the record whether the state court invoked a procedural bar when it denied the Smith's ineffective assistance of counsel claim raised in this 1995 post-conviction relief proceeding.

REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit's ruling that a state court finding of preclusion under Rule 32.2(a)(3) does not bar federal review is a sweeping pronouncement that effectively eliminates procedural default in all Arizona criminal cases in which the state courts have found, or will find, claims precluded in a post-conviction relief proceeding based on the defendant's failure to raise the claims in a prior proceeding. The Ninth Circuit's ruling is an unreasonable and conflicting application of *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (finding that a state court procedural ruling that is "dependent on an antecedent ruling on federal law" does not bar federal review). The Ninth Circuit's ruling in this case directly conflicts with case law from the Fourth Circuit holding that *Ake* (a direct review case) does not apply in federal habeas. The ruling also conflicts with decisions from the Sixth, Seventh, and Tenth Circuits regarding whether the *Ake* rule bars federal collateral review where a state procedural bar has been applied after the state court has engaged in something less than a complete on-the-merits review of the claim. This Court should grant certiorari review to resolve the conflict between the Ninth and the Fourth, Sixth, Seventh, and Tenth Circuits regarding *Ake*'s applicability, if any, to federal habeas.

Furthermore, the Ninth Circuit's holding (addressing an issue the Ninth Circuit raised on its own) that *Ake* creates an antidote to a state court finding of preclusion under Rule 32.2(a)(3) is inconsistent with this Court's post-*Ake* decision in *Stewart v. LaGrand*, 526 U.S. 115, 119 (1999) (finding a claim of ineffective assistance of counsel procedurally barred based on a state court ruling of preclusion under Rule 32.2(a)(3)). The holding is also inconsistent with numerous other post-*Ake* cases in which claims have been barred in federal habeas based on an application of the current version of Rule 32.2(a)(3). *See, e.g., Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998).

The Ninth Circuit's conclusion, based on its assessment of a 1992 amendment to Rule 32.2, that Arizona courts necessarily analyze the merits of a claim before applying the rules of preclusion is erroneous. The Comment to Rule 32.2(a)(3) provides that certain claims of "sufficient constitutional magnitude" will not be deemed precluded

absent a showing that the defendant "knowingly, voluntarily and intelligently" waived the claim. The Ninth Circuit's assessment that this provision requires an on-the-merits review of all precluded claims ignores the clear language of the Rule and the history of the Rule and the Comment. Moreover, case law, including an Arizona Court of Appeals decision, *State v. Espinosa*, 2001 WL 870025 (July 31, 2001), issued after the Ninth Circuit's ruling in this case, confirms that Arizona courts are not required to review the merits of precluded claims, but instead to engage in a *categorization* inquiry. Such an inquiry assesses only whether the claim is one that requires a personal, on-the-record waiver by the defendant. For claims that require this type of waiver, such as an assertion of the right to counsel, the right to a jury trial, or the right to plead guilty, the preclusion provisions of Rule 32.2(a)(3) do not apply unless there is an on-the-record waiver by the defendant. If, however, there is such a waiver, the claim is precluded in a post- conviction proceeding, and there is no requirement under Rule 32 that the state court assess the merits of the claim. For claims that do not require a personal, on-the-record waiver by the defendant, there is similarly no requirement that the state court assess the merits of the claim before finding it precluded under Rule 32.2(a)(3).

The Ninth Circuit's alternative ruling that the state courts did not clearly rely on a procedural bar ignores the express language of the state court orders denying Smith's claim on the basis that it was "precluded by failure to bring [it] previously, in accordance with Rule 32.2(a)." There is nothing ambiguous about that ruling.

Moreover, to the extent the state court's procedural rulings can somehow be construed to include a discussion of the merits of Smith's ineffective assistance claim, the Ninth Circuit's ruling fails to acknowledge the mandates of *Harris v. Reed*, 489 U.S. 255 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), allowing state courts to make an alternative ruling on the merits of a procedurally barred claim without vitiating the procedural bar to federal collateral review.

The Ninth Circuit's analysis of both of these issues is significant beyond the confines of this case because Rule 32.2(a)(3) remains in effect today and serves as a barrier to endless post-conviction litigation

in Arizona. The Ninth Circuit's ruling thus affects not only this case, but *every* pending and future Arizona criminal case (capital and non-capital) in which claims have been found (or will be found) precluded in a post-conviction proceeding under this Rule. If this ruling stands, it will effectively eliminate procedural default in a great majority of Arizona criminal cases and will deluge the federal district courts with cases requiring evidentiary hearings to address claims—such as that at issue in the instant case—not raised on direct appeal or in multiple post-conviction relief proceedings in state court.

Finally, this case is significant nationally because it involves an unwarranted federal court usurpation of a state court's authority to interpret state law. To the extent there is any ambiguity regarding whether Arizona courts review the merits of a claim before applying a state procedural bar, the Ninth Circuit should have granted the State's request that the question be certified to the Arizona Supreme Court. *See Coleman*, 501 U.S. at 743-44 (declining Coleman's invitation to announce for the Virginia Supreme Court that there is a constitutional exception to a Virginia procedural rule). An adherence to principles of federalism and comity requires that any ambiguity regarding Rule 32.2 be addressed to the Arizona Supreme Court in the form of a certified question.

ARGUMENTS

I

THE NINTH CIRCUIT'S RELIANCE ON THE "INDEPENDENT STATE GROUND" HOLDING IN *AKE V. OKLAHOMA* CREATES A CONFLICT WITH THE FOURTH, SIXTH, SEVENTH, AND TENTH CIRCUIT COURTS OF APPEALS.

There is a conflict among the circuits regarding the extent to which the procedural default holding in *Ake v. Oklahoma* applies, if at all, in federal habeas proceedings. In *Ake*, this Court excused—on direct appeal from the Oklahoma Supreme Court—the defendant's procedural default because "the State has made application of the procedural bar

dependent on an antecedent ruling on federal law." 470 U.S. at 75. At trial, Ake requested a psychiatric evaluation at state expense to determine his mental state at the time of the offense. *Id.* at 72. The trial court rejected his request, and he was unable to present testimony to support his insanity defense. *Id.* Ake filed a motion for new trial, but did not repeat his request for a psychiatric evaluation in that motion. After the motion was denied, Ake filed a direct appeal with the Oklahoma Court of Criminal Appeals, arguing, among other things, that he should have been provided the services of a court-appointed psychiatrist. *Id.* at 73. The Oklahoma Court of Criminal Appeals rejected his argument on the merits, then also ruled that he had waived the claim by not raising it in his motion for a new trial. *Id.* at 74.

On direct review, this Court addressed the merits of the claim notwithstanding the Oklahoma procedural bar. The Court ruled that, because under then existing Oklahoma law, federal constitutional errors could not be waived, the Oklahoma court had necessarily addressed the merits of the federal constitutional claim before applying a procedural bar. *Id.* at 74–75. Because Oklahoma had made the application of the procedural bar "dependent on an antecedent ruling on federal law," the issue was preserved for consideration on direct appeal. *Id.* at 75.

In the present case, the Ninth Circuit relied on *Ake* in finding that Smith's ineffective assistance of counsel claim was not procedurally defaulted because, according to the Ninth Circuit, before rejecting the claim on procedural grounds, the state court first determined that the claim was not of "sufficient constitutional magnitude," and thus necessarily considered the merits of the claim.

The Ninth Circuit's reliance on *Ake* is extraordinary for several reasons. First, the issue of whether *Ake* applies to claims precluded under Rule 32.2(a)(3) was raised by the Ninth Circuit on its own and was not briefed by the parties. Second, federal courts—including this Court—have repeatedly held in post-*Ake* decisions that a finding of preclusion under the current version of Rule 32.2(a)(3) bars federal review of a claim. *See Stewart v. LaGrand*, 526 U.S. 115 (1999) (upholding procedural bar on federal collateral review based on 1999 state court ruling that LaGrand's ineffective assistance of counsel claim

was precluded under Rule 32.2(a)(3)); *Ortiz v. Stewart*, 149 F.3d 923 (9th Cir. 1998) (finding that the district court properly ruled that claims that had not yet been raised in state court would be precluded from consideration in state court under Rule 32.2(a)(3)). The Ninth Circuit's belated application of *Ake* is inconsistent with those decisions.

The Ninth Circuit's reliance on *Ake* is also extraordinary because the circuit court's application of *Ake* conflicts with case law from the Fourth, Sixth, Seventh, and Tenth Circuits.

In *Coleman v. Thompson*, 501 U.S. 722 (1991), this Court questioned whether *Ake* applies to federal collateral review. In upholding a procedural bar based on an untimely (3-day late) state habeas petition, this Court held *Ake* did not dictate a finding that, by permitting merits briefing of a claim before the claim was dismissed, the Virginia Supreme Court had necessarily considered the merits of the claim:

> *Ake* was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if *Ake* applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.

501 U.S. at 741. This Court rejected Coleman's argument that a previous pronouncement by the Virginia Supreme Court that it would extend the time for filing a petition for state habeas "only if it is found that to deny the extension would abridge a constitutional right" resulted in at least a cursory review of the merits of constitutional claims before an appeal could be dismissed:

> Coleman reads [*Tharp v. Commonwealth*, 175 S.E.2d 277 (Va. 1970)] as establishing a practice in the Virginia Supreme Court of examining the merits of all underlying constitutional claims before denying a petition for appeal or writ of error as time barred. A more natural reading is that the Virginia Supreme Court will only grant an extension of time if *the denial itself* would abridge a constitutional right. That is, the

> Virginia Supreme Court will extend its time requirement only in those cases in which the petitioner has a constitutional right to have the appeal heard.

Id. at 741-42.

The question left unanswered in *Coleman*, whether *Ake* applies in federal habeas, remains unanswered by this Court. The Circuits have answered the question differently. The Fourth Circuit has held that "the rule of *Ake* concerning the state procedural rules and underlying federal claims does not apply in the habeas context." *O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996). *O'Dell* thus directly conflicts with the Ninth Circuit's opinion in this case.

Other circuit courts have applied *Ake* in federal habeas, but only in ways that conflict with the Ninth Circuit's holding in the instant case. In *Willis v. Aiken*, 8 F.3d 556, 561–62 (7th Cir. 1993), for example, the Seventh Circuit rejected an *Ake*-based claim that a state court review for "fundamental error" vitiated a state procedural bar resulting from the defendant's failure to challenge the constitutionality of a jury instruction at trial or on direct appeal. After the Indiana state courts rejected a post-conviction relief claim that an allegedly deficient jury instruction resulted in "fundamental error," the Seventh Circuit ruled that the procedural bar precluded federal review of the claim. *Id.* at 566. The Seventh Circuit reached that conclusion because "Indiana does not equate federal constitutional error with fundamental error," but engages in a "very particularized assessment of the impact of the error on the particular case." *Id.* at 566.

In *Scott v. Mitchell*, 209 F.3d 854 (6th Cir. 2000), the Sixth Circuit declined to equate a state (Ohio) court's "plain error" review to a "review on the merits." After noting this Court's discussion of *Ake* in *Coleman*, the Sixth Circuit stated: "The Supreme Court, then, does not find the mere reservation of discretion to review for plain error in exceptional circumstances sufficient to constitute an application of federal law." 209 F.3d at 868.

Finally, in *Gutierrez v. Moriarty*, 922 F.2d 1464 (10th Cir. 1991), the Tenth Circuit similarly declined to extend *Ake* to a case in which the district court had found that New Mexico's "fundamental error" exception to its rules of preclusion rendered the state bar inadequate. *Id.* at 1469.

The instant case is indistinguishable from these Fourth, Sixth, Seventh, and Tenth Circuit cases, because it similarly involves a limited type of review relating to an exception to a state rule of preclusion, in this case Arizona's Rule 32.2(a)(3). The exception to the Rule, according to the Ninth Circuit, arises from the Comment to the Rule, which provides in pertinent part as follows:

> [S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim.

See Appendix J.

The State disagrees that the Comment contemplates anything other than a *categorization* inquiry—a determination whether a claim fits within a category of claims that require a personal, on-the-record waiver by the defendant. Even assuming, however, that the Comment reflects some type of merits review, such a review is necessarily a lesser type of review than that engaged in by the state court in *Ake*, in which the State of Oklahoma conceded that the review at issue equated with a review for federal constitutional error. *See* 470 U.S. at 74–75. In this case, the "sufficient constitutional magnitude" language relied on from the Comment more closely parallels the "fundamental error" or "plain error" language applied in the cases cited above distinguishing *Ake*. Accordingly, the Ninth Circuit stands alone in its willingness to extend *Ake* beyond the confines of that case.

The conflict among the circuits is of particular significance because it involves the important policy consideration of whether states should be encouraged to provide exceptions to rules of preclusion. Under the Ninth Circuit's ruling, the message sent to Arizona and other states is that they can best protect the sanctity and finality of their state court judgments by eliminating exceptions to the rules of preclusion.

In *Scott*, the Sixth Circuit expressed its concern about adopting this type of approach:

> We issued a similar ruling in *Paprocki v. Foltz*, 869 F.2d 281, 284–85 (6th Cir. 1989). There we enforced a default for failure to object contemporaneously in a Michigan court, although the state courts reserved the right to excuse the default for "manifest injustice." We noted that
>
> > [w]e would be loath to adopt an exception to the "cause and prejudice" rule that would discourage state appellate courts from undertaking the sort of inquiry conducted by the Michigan court, and we do not believe that the state court's explanation of why the jury instructions resulted in no manifest injustice can fairly be said to have constituted a waiver of the procedural default.
>
> *Id.* at 285. Although this statement appears addressed more towards the determination of whether the state courts actually enforced the bar . . . instead of its independence from federal law, the reasoning is equally applicable to this discussion.

209 F.3d at 854.

Other courts have similarly recognized the danger in following the course set by the Ninth Circuit in this case. The Seventh Circuit noted on a related point that an overly severe approach "would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disable the state from enforcing its procedural rules with respect to many others. Neither prisoners' interests nor the interests of

federalism would be served by such a development." *Prihoda v. McCaughtry*, 910 F.2d 1379, 1384 (7th Cir. 1990).

Given the conflict between the Ninth Circuit and the Fourth, Sixth, Seventh, and Tenth Circuits, and given the strong policy concerns weighing against the Ninth Circuit's approach in this case, this Court should take the opportunity to address a "recurring litigation problem that has not yet been the focus of Supreme Court guidance." *Willis*, 8 F.3d at 561–621; R.Sup.Ct. 10.

II

ASSUMING *AKE* APPLIES IN FEDERAL HABEAS, THE NINTH CIRCUIT'S RULING UNREASONABLY EXTENDS *AKE* BY MISINTERPRETING ARIZONA LAW.

Assuming *Ake* applies in federal habeas, the Ninth Circuit's ruling in this case unreasonably extends its reach because the Ninth Circuit erroneously (a) found that the state courts did not rely on a procedural bar, (b) mischaracterized the nature of the review conducted by state courts regarding precluded claims, and (c) refused to certify a question to the Arizona Supreme Court to clarify any perceived ambiguities in state law.

A. *The State Courts Clearly Relied On A Procedural Bar.*

In October 1995, the trial court dismissed Smith's ineffective assistance of counsel claim in Smith's third post-conviction relief proceeding, using the following language:

> IT IS ORDERED dismissing the petition.
>
> This order is based on the following findings:
>
> The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of

> counsel, or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.
>
> The claims are so old *they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a)* and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

Appendix D (emphasis added).

Two months later, the state court revisited Smith's claim when Smith requested reconsideration. The trial court provided additional discussion relating to the merits of Smith's excuse for not raising the ineffectiveness claim previously (calling the excuse "either outrageous or ridiculous, whichever adjective is most appropriate"), but used essentially the same language in denying the claim on procedural grounds. Appendix E.

There is nothing unclear about the language used by the state court. Furthermore, to the extent the procedural ruling can somehow be construed to include a discussion of the merits of the ineffective assistance claim, rather than the merits of the excuse proffered for failing to raise the claim earlier, that discussion does not render the procedural bar ineffectual. *See Harris v. Reed*, 489 U.S. 255, 264 n.10 (1989) (ruling that a state court's alternative ruling on the merits of a procedurally barred claim does not vitiate the procedural bar); *see also Coleman*, 501 U.S. at 744 (holding that an "ambiguity" in state court ruling dismissing state court petition "upon consideration of all the filed papers," including briefing addressing the merits of the petitioner's claims, did not override the state courts' ruling dismissing the petition on procedural grounds). The Ninth Circuit's conclusion that the state courts did not rely on a clear procedural bar directly conflicts with *Harris* and *Coleman*.

B. *The Ninth Circuit Misinterpreted 1992 Changes to Rule 32, and Erred by Concluding that Arizona Courts Are Now Required to Review the Merits of a Claim Before Finding it to be Precluded.*

The Ninth Circuit's assertion that Arizona courts necessarily review the merits of all precluded claims is belied by the record in this case. As noted previously, the trial court's ruling on Smith's ineffective assistance claim raised in his third post-conviction proceeding addressed the merits of Smith's *excuse* for not raising the claim previously, not the underlying ineffective assistance claim. The trial court's "merits" discussion makes no mention of *Strickland v. Washington*, 466 U.S. 668 (1984) (providing framework for analyzing claims of ineffective assistance of counsel), and does not discuss in any way what trial counsel should have done differently. Nor does it discuss how counsel's conduct affected the outcome of the trial and sentencing.

Smith has never argued in state or federal court that the trial court's ruling on preclusion included a review of the merits of the underlying claim or that the trial court failed to follow the rules of procedure and practice in addressing his claim. Smith argued instead that the rules of procedure should not be applied to him because of what he considered to be an adequate "excuse" for his own failure to comply with the rules of procedure. Accordingly, the Ninth Circuit's assertion that the state courts reviewed the merits of Smith's claim is inaccurate and addresses an issue that was not properly before the federal courts.

The Ninth Circuit's ruling does not hold that Arizona law has always required a review of the merits of precluded claims. Although the relevant preclusion provisions of Rule 32.2 have been in effect since 1973, the Ninth Circuit's ruling focuses only on claims found precluded after December 1, 1992, when minor changes to the Rule were enacted. The Ninth Circuit had previously ruled that a finding of preclusion under the pre-1992 version of Rule 32.2(a)(3) created a procedural bar to federal review, *see Poland v. Stewart*, 169 F.3d 573, 578 (9th Cir. 1999), and the opinion in this case does not take issue with that ruling. The ruling instead focuses on the 1992 amendment to Rule 32.2, and

the Arizona Supreme Court's Comment to the amended Rule, to find that the Comment "makes clear that the application of the *amended* procedural default rule requires a separate examination of a claim's constitutional magnitude." *Smith*, 241 F.3d at 1197 n.6 (emphasis added).

The recent opinion in *Espinosa* makes clear that the amended Rule and Comment do not require an examination of the merits of a claim before it can be deemed precluded under Rule 32.2(a)(3). *Espinosa* confirms (in a post-1992 case) that the review engaged in by Arizona courts before applying Rule 32.2(a)(3) is simply a categorization decision, rather than a decision on the merits:

> [P]reclusion does not apply to claims involving certain constitutional rights unless the record shows that the defendant knowingly, voluntarily, and intelligently waived the right. "If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant 'knowingly, voluntarily and intelligently' waived the claim." Cmt., Ariz. R. Crim. P. 32.2(a)(3). Thus, preclusion would not apply to claims involving such constitutional rights as the right to counsel, *see State v. Harding*, 137 Ariz. 278, 670 P.2d 383 (1983); the right to a jury trial, *see State v. Masengill*, 110 Ariz. 310, 518 P.2d 560 (1974); or the right to be tried by a twelve-person jury, *see State v. Smith*, 197 Ariz. 333, 4 P.3d 388 (App. 1999), unless the record establishes that the defendant has knowingly, voluntarily, and intelligently waived the right. And conversely, if the claim implicates a less significant constitutional right, preclusion applies even without a showing that the defendant knowingly, voluntarily, and intelligently waived the right. In other words, "the state may simply show that the defendant did not raise the error at trial . . . and that would be sufficient to show that the defendant has waived the claim." Cmt., Ariz. R. Crim. P. 32.2(a)(3).

2001 WL 870025, at 2.

The *Espinosa* court ruled that the defendant's claim relating to the prosecutor's actions in withdrawing a plea offer was precluded under Rule 32.2(a)(3) because "[n]either of the alleged constitutional rights implicated here is such 'an inherently personal right of fundamental importance' that it must be personally and expressly waived." *Id.* at ¶ 7. (citing *State v. Smith*, 4 P.3d 388 ¶ 13 (Ariz. App. 1999)).

The Arizona court's analysis of Rule 32.2 should be given great deference. *See Coleman*, 501 U.S. at 743-44 (declining Coleman's invitation to announce for the Virginia Supreme Court that there is a constitutional exception to a Virginia procedural rule). The Ninth Circuit's ruling in this case (made without the benefit of *Espinosa*) should be set aside.

Furthermore, even without *Espinosa*, the Ninth Circuit's conclusion that the 1992 amendments to Rule 32.2 significantly changed the landscape of Arizona's rules of preclusion was untenable. Until 1992, Rule 32.2 stated that a defendant must "knowingly, voluntarily and intelligently" decide not to raise an issue at trial, on appeal, or in a previous collateral proceeding. The only change in 1992 was to eliminate the "knowingly, voluntarily and intelligently" language from the Rule, which now provides that a claim is precluded if it "has been waived at trial, on appeal, or in any previous collateral proceeding." Ariz. R. Crim. P. 32.2(a)(3), Cmt.

The 1992 changes to Rule 32.2 were proposed by the Arizona Attorney General's Office as part of a Joint Legislative and Judicial Study Committee on Post-Conviction Relief. See Appendix J, Joint Legislative Study Committee on Post-Conviction Relief, Minutes of Meeting Thursday, Oct. 17, 1991, at 2. The changes were enacted to ensure the proper application of the rules of preclusion, which the committee understood to operate as a *bar* to federal court consideration of claims. *Id.* (comment by Judge Ronald Reinstein). The Attorney General's representative on the committee noted that the "knowingly, voluntarily and intelligently" language in the previous version of the Rule was not necessary, even for "those constitutional claims that the U.S. Supreme Court said have to be individually waived by the defendant" because those types of claims would be covered by virtue

of the state's burden to show that the defendant had waived that type of claim. *Id.* The Attorney General's representative further noted that for all other claims, which can be waived by counsel, "if it's not raised, it's lost." *Id.*

The amendment to Rule 32 was more of a clarification than a change in the law. Even under the pre-1982 version of Rule 32, the trial court was permitted to infer waiver based on "the petitioner's failure to appeal or to raise an issue on appeal after being advised by the sentencing judge of the necessity that he do so, or his failure to raise any ground then available to him in a previous Rule 32 proceeding in which he was represented by counsel." Ariz. R. Crim. P. 32.2(e) (1987). Thus, the amendment to Rule 32 simply eliminated any question regarding whether there was a need to examine the defendant's subjective intent before finding preclusion.

The Ninth Circuit's implicit assumption that the 1992 amendments to Rule 32.2 operate to make it easier for a defendant to overcome a procedural bar for claims precluded in state court is ironic because the 1992 amendments to Rule 32.2 do exactly the opposite—they make it *more difficult* for a defendant to avoid the procedural bar. Given the express language of Rule 32.2 and the history of the changes to the Rule, it is illogical to suggest that those changes should be read to eliminate any type of bar to federal review of claims found to be precluded under Rule 32.2(a)(3).

In *Ortiz*, the Ninth Circuit implicitly acknowledged that the 1992 amendment to Rule 32.2 operated to *restrict* remedies available to a defendant:

> Second, Ortiz argues that the district court erred by retroactively applying the 1992 version of Arizona Rule of Criminal Procedure 32.2, which was not in effect when Ortiz filed his first Rule 32 petition in 1983. Until 1992, Rule 32.2(a)(3) stated that a defendant must "knowingly, voluntarily and intelligently" decide not to raise an issue at trial, on appeal, or in a previous collateral proceeding in order for the issue to be precluded. Ariz. R. Crim. P. 32.2 comment

(1997). The current version of the rule simply conditions preclusion on whether an issue has been waived at trial, on appeal, or in a collateral proceeding. See Ariz. R. Crim. P. 32.2(a)(3) (1997).

We reject Ortiz's contention that the district court retroactively applied the 1992 version of Rule 32.2 to Ortiz's petition.

149 F.3d at 931. The Ninth Circuit, as well as counsel for Ortiz, obviously interpreted the current version of Rule 32 to be *less* favorable to a defendant than the previous version. That interpretation is consistent with the language of amended Rule 32 and should have been followed by the Ninth Circuit in the instant case.

The Ninth Circuit misinterpreted the Comment to the 1992 amendment to Rule 32 and dicta from two Arizona Court of Appeals decisions, *State v. Curtis*, 912 P.2d 1341, 1344 (Ariz. App. 1995), and *State v. French*, 7 P.3d 128, 129–31 (Ariz. App. 2000), as requiring an assessment of the merits of a claim before it can be deemed precluded under Rule 32.2(a)(3). The entire Comment reads as follows:

> The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must "knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya [sic], 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, *unless such knowledge is specifically required to waive the constitutional right involved.* If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

Ariz. R. Crim. P. 32.2(a)(3), Comment (emphasis added). See Appendix I.

Read in context, the reference in the Comment to claims of "sufficient constitutional magnitude" does not recognize or establish any general exception to Arizona's rules of preclusion. The Comment merely acknowledges that Arizona's rules of preclusion will not bar a claim involving a narrow category of rights absent an on-the-record personal waiver by the defendant. Once there is such a showing, however, the normal rules of preclusion apply. If, for example, prior to trial a defendant avows to the trial court that he is knowingly, voluntarily, and intelligently waiving his right to counsel, and the trial court accepts the avowal, the normal rules of preclusion will bar any subsequent attempt to pursue a post-conviction claim that the defendant was denied his right to counsel. Thus, the state courts' analysis of whether a claim is part of a "narrow category of constitutional rights" is not an assessment of the merits or the "magnitude" of the constitutional claim, but rather a categorization decision—an assessment limited to whether the claim requires an affirmative on-the-record waiver by the defendant.

In this respect, the Comment is consistent with the pre-1992 version of the rule. The original comment to the prior version of the rule pointed out that the requirement of personal waiver by a defendant is limited to "such fundamental decisions as pleading guilty, waiving trial by jury, waiving a preliminary hearing, and whether or not to appeal," rather than to "tactical decisions made during the course of trial by counsel acting as manager of the case." Ariz. R. Crim. P. 32.2 (1987), Comment.

In addition to *Espinosa*, other Arizona cases addressing post-1992 post-conviction proceedings similarly support the conclusion that the 1992 amendment to Rule 32.2 did not drastically change the landscape of the rules of preclusion. For example, in *Krone v. Hotham*, 890 P.2d 1149, 1150 (Ariz. 1995), the Arizona Supreme Court discussed whether the amended version of Rule 32 precluded a defendant under sentence of death from filing a notice of post-conviction relief before his direct appeal concluded. The court ruled that a defendant was entitled to pursue post-conviction relief before he completed his direct appeal. *Id.* at 1151. The court cautioned, however, that "the usual rules of preclusion will apply" and noted that "if a defendant's early petition for post-conviction relief raises a limited number of issues, the defendant waives other issues he could have then raised but did not." *Id.*

In discussing procedural default, the Arizona Supreme Court in *Krone* referenced its earlier decision in *State v. Conner*, 786 P.2d 948 (Ariz. 1990), in which the defendant had successfully raised a claim of ineffective assistance of sentencing counsel in a post-conviction relief petition. When the defendant attempted, in a subsequent petition, to raise ineffective assistance of trial counsel, the court held that the issue was waived by not having been raised previously. 786 P.2d at 950–51. The Arizona Supreme Court's reference in 1995 to pre-1992 law regarding preclusion of post-conviction remedies establishes that the 1992 amendments did not alter the rules of preclusion in a way that benefitted the defendant.

The current version of Rule 32.2(a)(3) and the Comment to the Rule are consistent with this Court's mandate that certain "fundamental rights" can only be waived by an informed waiver by the defendant personally. This Court has stated,

> What suffices for waiver depends on the nature of the right at issue. . . . For certain fundamental rights, the defendant must personally make an informed waiver. *See, e.g., Johnson v. Zerbst*, 304 U.S. 458, 464–65, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938) (right to counsel); *Brookhart v. Janis*, 384 U.S. 1, 7–8, 86 S. Ct. 1245, 16 L. Ed. 2d 314 (1966) (right to plead not guilty). For other rights, however, waiver may be effected by action of counsel.

New York v. Hill, 528 U.S. 110, 114 (2000). *See also Taylor v. Illinois*, 484 U.S. 400, 417–18 (1988) (rejecting argument that a defendant should not be held responsible for attorney error, and distinguishing "basic rights that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client," for example, the right to plead not guilty, right to a jury trial, and right to be present during trial).

The Ninth Circuit's reliance on dicta from *State v. Curtis* is misguided. At issue in *Curtis* was whether an Arizona trial court could summarily dismiss a successive petition for post-conviction relief ("PCR") without putting the State to the burden of filing a response. The Arizona Court of Appeals ruled that a trial court has inherent power to screen and dismiss facially non-meritorious petitions, including those obviously precluded, without waiting for a response from the State. 912 P.2d at 1344.

The defendant in *Curtis* had been convicted of sexual assault. On direct appeal, he raised various claims of ineffective assistance of counsel. Subsequently, he filed a first PCR petition alleging different claims of ineffective assistance. *Id.* at 1342–43. The trial court denied the petition, and the defendant later filed a second PCR petition asserting various claims, including ineffective assistance of counsel. *Id.* at 1343. Citing Rule 32.2(a)(2) and (3), the trial court, without waiting for the State to respond, found all of the claims precluded. 912 P.2d at 1343.

After ruling that a trial court has discretion to dismiss a facially non-meritorious petition, the court of appeals considered whether the trial court was correct in determining that the claims at issue were precluded. In this regard, the court of appeals noted:

> A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the "asserted claim is of

sufficient constitutional magnitude." Comment to Rule 32.2(a)(3) (Supp. 1994).

Curtis, 912 P.2d at 1344. The court of appeals went on to reject the defendant's effort to excuse his failure to raise his claim earlier by alleging ineffective assistance of counsel, noting that "there is a quality of infinite regression" to such a claim. 912 P.2d at 1345. "If, with each successive claim, a petitioner could avoid preclusion merely by asserting that all prior counsel were ineffective, Rule 32.2(a)(3) would be stripped of effect." *Id.*

Neither *Curtis* nor the other decision relied on by the Ninth Circuit, *French* (citing *Curtis* in ruling that ineffective assistance claim were precluded where not raised previously) is inconsistent with *Espinosa*, in which the preclusion issue was necessary to the court's ruling and in which the state court provided a more complete discussion of the term "sufficient constitutional magnitude." *Espinosa* is thus controlling, and compels the conclusion that Arizona courts are not required to address the merits of precluded claims.

C. *The Ninth Circuit Erred by Refusing to Certify a Question to the Arizona Supreme Court to Clarify the Meaning of Arizona Law.*

The State believes that the language of Rule 32.2(a)(3) and the cases interpreting the Rule bely any argument that the state courts are required to address the merits of claims precluded under the Rule. However, to the extent there is any ambiguity or confusion over the meaning of Rule 32.2(a)(3), the Ninth Circuit should have granted the State's request that a question be certified to the Arizona Supreme Court to resolve the ambiguity. In *Coleman*, this Court expressed a reluctance to answer questions that are the province of the state courts:

> *Coleman* argues that *O'Brien* [*v. Socony Mobil Oil Co.*, 152 S.E. 2d 278 (Va. 1967)] demonstrates that the Virginia supreme court will review the merits of constitutional claims before deciding whether to dismiss an appeal as untimely. The court in *O'Brien* did conduct such a review, but the court also explicitly declined to announce a rule that there is a constitutional exception to the time requirement for filing a notice of appeal. There is no evidence other than *O'Brien* that the Virginia Supreme Court has ever conducted such a review, and *O'Brien* explicitly declined to announce such a practice. *We decline Coleman's invitation to announce such a practice for that court.*

501 U.S. at 743–44 (emphasis added).

This Court has endorsed the practice of certifying questions of state law to state courts for their authoritative answers. In *Arizonans for Official English v. Arizona*, 520 U.S. 43, 75 (1997), this Court held that the district court and the Ninth Circuit erred by refusing to certify questions of state law to the Arizona Supreme Court. This Court cautioned that the certification procedure was designed "to avoid federal-court error in deciding state-law questions antecedent to federal constitutional issues. . . ." *Id.*; *see also Fiore v. White*, 528 U.S. 23, 29 (1999) (certifying a question to the Pennsylvania Supreme Court because "the answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case").

Arizona courts have made clear their expectation that preclusion of remedies under amended Rule 32 is intended to bar future collateral review:

> Some concern has been raised over the years that denying relief by summary order might create confusion about whether a procedural default has occurred in the post-conviction relief proceeding, which would preclude federal habeas corpus review, *Wainwright v. Sykes*, 433 U.S. 72, 80–88, 97 S. Ct. 2497, 2503–07, 53 L. Ed. 2d 594 (1977). Whatever validity there once may have been to this argument is now gone. Under *Ylst* [*v. Nunnemaker*] and *Coleman* the federal courts will "presume that no procedural default has been invoked" when an unexplained order leaves in place an earlier decision on the merits. *Ylst*, 501 U.S. at ___, 111 S.

> Ct. at 2594. We presume that the federal courts will do as the United States Supreme Court directs and "look through" to the superior court ruling to determine whether the issues raised in the federal habeas corpus proceeding were resolved in Arizona courts on the merits *or are precluded by procedural default.*

State v. Whipple, 866 P.2d 1358, 1360 (Ariz. App. 1993) (emphasis added.) Given that expectation, and given the breadth of the Ninth Circuit's opinion in eliminating procedural default in a vast number of cases, any perceived ambiguity in the application of Rule 32.2(a)(3) should have been addressed to the Arizona Supreme Court in the form of a certified question.

CONCLUSION

This case is of critical significance to the State of Arizona, affecting all criminal cases in which a state court has found, or will find, claims precluded in a post-conviction proceeding. The Ninth Circuit's belated discovery of *Ake v. Oklahoma* as a basis for vitiating the procedural bar resulting from a finding of preclusion under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure is not supported by law or by logic, and should be rejected by this Court. The Ninth Circuit's ruling conflicts with case law from four other circuits, and is premised on a misinterpretation of Arizona law. Accordingly, and based on the foregoing authorities and argument, the State of Arizona respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted.

JANET NAPOLITANO
Attorney General

KENT E. CATTANI
Chief Counsel,
Capital Litigation Section
(Counsel of Record)

Attorneys for PETITIONERS

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APPENDIX A

[Filed March 6, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DOUGLAS SMITH Petitioner-Appellant,	)	
v.	)	
TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 D.C. No. CV-87-234-TUC-RMB
	)	OPINION

Appeal from the United States District Court for the District of Arizona;
Richard M. Bilby, Chief Judge, Presiding. D.C. No. CV-87-234-TUC-RMB.

Argued and Submitted August 17, 2000 -- Pasadena, California

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, DAVID R. THOMPSON, Circuit Judges.

COUNSEL

S. Jonathan Young, Tucson, Arizona; John F. Palumbo, Law Offices Pima County Public Defender, Tucson, Arizona, for the petitioner-appellant.

Scott Bales, Solicitor General, Phoenix, Arizona, for the respondent-appellee.

FERGUSON, Circuit Judge:

Robert Douglas Smith ("Smith") appeals from the district court's dismissal of his habeas corpus petition on the ground of procedural default. He claims that his trial counsel failed to investigate his mental condition or to present adequate mitigating testimony during the sentencing phase of his trial, despite clear indications at the time of the presence of a mental disorder. We reverse the district court's ruling that federal habeas review is barred. Because Smith has made a colorable claim to relief, we order an evidentiary hearing in the district court.

I.

In March of 1982, Smith and accomplice Joe Leonard Lambright were convicted of sexual assault, kidnaping, and first-degree murder. [FN1] The principal witness against them at trial was another accomplice, Kathy Foreman ("Foreman"), who exchanged her testimony on the Government's behalf for freedom from prosecution.

FN1. Because the facts of the offense are set forth in our en banc opinion, we do not repeat them here. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir.1999) (en banc).

After the guilt phase of Smith's trial, the prosecution sought the death penalty on the theory that the murder had been committed in an especially heinous, cruel, or depraved manner under Ariz.Rev.Stat. Ann. § 13–703(F)(6). The government called Smith's former cellmate to the stand who, in seeking to reduce his own sentence, had told a criminal investigator that Smith laughed while fully confessing to the crime. When the government next called the investigator to testify about the conversation, she confirmed that Smith had described the crime to his cell-mate in exceptional detail, showed no remorse, and snickered throughout. In addition to presenting testimonial evidence, the prosecution displayed photographs of how the crime scene looked at night and during the day so that the court could fully grasp the victim's terror before she died.

Smith's counsel took less than a day to present the mitigating evidence he had gathered in support of sparing his client's life. Despite obvious indications that his client suffered from a mental disorder, the lawyer neither obtained nor presented any evidence of his psychiatric history and continuing mental impairment. He also failed to collect or present records relating to Smith's horrific childhood. Instead, his evidence consisted entirely of the testimony of Smith's mother-in-law and two sisters. Each witness was brief. Each offered only a general characterization of Smith as a nice and generous person who, along with his sisters, had grown up in an unstable household.

In closing argument, Smith's lawyer offered the court some reasons not to impose the death penalty. He opened by saying, "[f]irst of all, the most mitigating factor in the case is the fact that Kathy Foreman wasn't prosecuted at all." He made passing reference to Smith's "abusive childhood." Apparently believing that evidence of Smith's mental disorder might constitute a justification for the death penalty, the lawyer asserted:

> I'm told today by Jim Meyers there is a report from the hospital in Houston, which I haven't seen yet.... The reports I have are that he has problems with depression. He is a person of average intelligence. I don't know, and I'm making the statements on the reports I have seen so far, I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated.

***1194** Next, he asked the court to consider the *victim's family's* "great loss" in deciding Smith's punishment. He returned again to the government's failure to prosecute Foreman, spoke abstractly of his personal opposition to the death penalty, and promptly closed by saying, "[f]inally, again, I question how the Court could agree with the government, which is asking for the death penalty for Robert Smith, when it was the same government agency that chose to let Kat Foreman go without any prosecution at all... I don't think that's justice."

The state trial judge sentenced Smith to death. He rejected the lawyer's argument that Foreman's treatment at the government's hands warranted a lesser sentence for Smith because he did not "believe that any of the ramifications of her grant of immunity have diminished the moral, legal or ethical culpability or responsibility of either Mr. Smith or Mr. Lambright by any degree whatsoever." He justified his decision to impose death by stressing that, "I have, in fact, searched the record, the file, the pre-sentence report, my trial notes and recollections for any and all other factors which might conceivably mitigate your culpability for offenses of kidnaping and sexual assault and found none."

II.

The same office that represented Smith at trial continued to represent him unsuccessfully on appeal and in post-conviction proceedings. On direct appeal, the Arizona Supreme Court affirmed both Smith's conviction and sentence. *See State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (Ariz.1983). Smith's counsel then filed a series of state and federal post-conviction petitions, none of which included an ineffective assistance of counsel claim, and all of which were denied.

After exhausting available state remedies, Smith's lawyer filed an amended federal petition for writ of habeas corpus. Soon after, District Judge Bilby received a letter from Smith himself, complaining that he had instructed his lawyer to raise a claim of ineffective assistance of counsel, but that his lawyer had failed to do so. In the letter, Smith wrote:

> My attorney says he can't rais[sic] or file the issue of enafective [sic] assistants [sic] of countsaling [sic] cause he is empoleed [sic] by the same office as the attorney that handeled [sic] my trial. I'm under the inpresstion [sic] from him that if all the issue [sic] is denied, that I could then get the courts to apoint [sic] me another attorney to file this issue for me, IS THIS TRUE? To my understandig [sic] from everyone I've ask [sic], wrote [sic] to tells [sic] me diffrant [sic] things. I've written Denise Young and ask [sic her about this, it took her a long time

to respond cause she's so bissy [sic] and still did'nt [sic] answer my questions [sic]. Sorry to have to bother you with this but I feel this is a very inportant [sic] issue, Is'nt [sic] it also true that all issues has [sic] to be rased [sic] and filed at one time acording [sic] to the new apeals [sic] law passed a cuppall [sic] of year [sic] ago? I would like this court to know that I want this issue inclouded [sic] in my apeals [sic]. I would like take this to [sic] time to respectfuly [sic] ask this Honorable Court to apoint [sic] me a new FEDERAL ATTORNEY to work with my attorney Mr. John F. Palumbo at the PIMA COUNTY PUBLIC DEFENDERS OFFICE TUCSON AZ. if this is possible, if not, please apoint [sic] me new Federal Apeal [sic] ATTORNEYS. THANK YOU! very much for your concederation [sic], time and help with this matter.

Smith's counsel confirmed in an affidavit to the court that the claim had not been raised because his employer, a state agency, prohibited its lawyers from attacking each other's performance as a matter of policy.

In response to Smith's letter, the district court appointed a lawyer in private practice to litigate his claim of ineffective assistance of trial counsel. Smith then filed a state post-conviction petition alleging for the first time several instances of ineffective assistance at trial and sentencing, which the court dismissed as procedurally ***1195** barred. The federal district court also refused to adjudicate Smith's ineffective assistance of counsel claim on the ground that "the [state] trial court found the claims precluded as a matter of state law."

III.

[1] We review de novo a district court's decision to deny a petition for writ of habeas corpus. *See Mayfield v. Calderon*, 229 F.3d 895, 2000 WL 1514610, at * 4 (9th Cir. October 13, 2000).

IV.

Smith raised an ineffective assistance of counsel claim for the first time in his third state post-conviction petition. The state court dismissed the claim in October of 1995. Two months later, the state court revisited Smith's claim in an order denying his motion for reconsideration. In the order, the court wrote:

Counsel's assertion on page 4, line 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed ... to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith" is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client in an appellate matter from ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.
It is HEREBY ORDERED Defendant's Motion for Rehearing is denied.
The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are

summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

[2][3][4] We must determine whether the state court judgment in Smith's case bars federal review of his Sixth Amendment claim. *See Coleman v. Thompson*, 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state court's procedural ruling will bar our review only if its basis is separate and distinct from the federal question. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *see also Coleman*, 501 U.S. at 729–30, 111 S.Ct. 2546. [FN2] The State contends that the Arizona court's procedural default ruling in this case constitutes an independent state ground that bars us from reviewing Smith's ineffectiveness claim. [FN3]

FN2. To bar our review, a state's procedural default rule must also be adequate, which means that it is "strictly or regularly" followed. See *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *see also Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). We have held that Arizona's procedural default rule is regularly followed in several cases. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir.1998); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.1997).

FN3. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Because we conclude that the state court's ruling did not rest on an independent state ground, we do not address Smith's argument that the policy preventing employees from attacking the competency of any of the agency's lawyers constitutes cause

because it was an "objective factor" that was "external" to the petitioner and that "cannot fairly be attributed to him." *Id.*, 501 U.S. at 753, 111 S.Ct. 2546. We note however, that his argument appears to have merit under our recent decision in *Manning v. Foster*, 224 F.3d 1129, 1134 (9th Cir.2000), where we held that "a conflict of interest, independent of a claim of ineffective assistance of counsel ... constitute[s] cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim."

***1196** In *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that when a state's procedural default rule depends on an assessment of a federal claim, federal review is not barred. The state court in that case explicitly held that Ake had waived his federal constitutional claim by omitting it from his motion or a new trial. *Id.* at 74, 105 S.Ct. 1087. That court had ruled in another state case, however, that the waiver rule did not apply in cases of fundamental trial error. *Id.* By creating such an exception, "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." The Supreme Court concluded that because "resolution of the state procedural law question depends on a federal constitutional ruling, the state- law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75, 105 S.Ct. 1087.

We have similarly held that federal habeas review is not barred when a state makes the application of its default rule depend on a consideration of federal law. *See, e.g., Park v. California*, 202 F.3d 1146 (9th Cir.2000), *cert. denied*, — U.S. —, 121 S.Ct. 277, 148 L.Ed.2d 202 (2000); *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir.1995); *Russell v. Rolfs*, 893 F.2d 1033, 1035–36 (9th Cir.1990). In *Park*, 202 F.3d at 1149, the state court refused to consider the petitioner's federal constitutional claim because he had failed to raise it on direct appeal. Despite the state court's explicit reliance on procedural default in its ruling, we held that Park's federal claim was cognizable in federal habeas corpus proceedings because the California

Supreme Court had held in another case that a petitioner could overcome the procedural bar if he could show a violation of "fundamental constitutional rights." Id. at 1152. As we explained, "in light of [the California Supreme Court's] acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the [procedural] bar to any federal constitutional claims raised in Park's state habeas petition." *Id.* at 1153.

We also held in *McKenna v. McDaniel*, 65 F.3d at 1489, that a state court judgment explicitly invoking Nevada's procedural default rule as the basis for dismissing a post-conviction petition did not preclude federal review because the state court had explained in another case that it enjoyed the discretion to address errors of "constitutional dimension." We concluded that the existence of a discretionary exception in cases of constitutional dimension rendered the court's state-law procedural ruling "necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision." *Id.* at 1489.

It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. ***1197** The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review.

Moreover, it is clear at the time of the state's procedural ruling, Arizona courts were required to consider the merits of a claim. Ariz. R.Crim. Pro. 32.2(a) generally bars a defendant from obtaining relief from his conviction on a ground that he waived at trial, on appeal, or in any previous collateral proceeding. [FN4] At the time of the state

court's procedural ruling, however, Arizona courts were required to examine the nature of a claim to determine whether the state's procedural default rule applied. *See State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341, 1344 (Ct.App.1995); *see also State v. French*, 198 Ariz. 119, 7 P.3d 128, 130 (Ct.App.2000). Under Arizona's procedural default rule, "[a] claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude." *Curtis*, 912 P.2d at 1344 (internal quotation marks omitted). [FN5] Thus, Rule 32.2's procedural default rule applies where a petitioner's "belated focus" on an alleged error "lacks sufficient constitutional magnitude to revive an issue." *Id.* at 1344. [FN6]

FN4. Since 1992, Rule 32.2 provides, in pertinent part:
a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

FN5. Arizona's exception for overcoming procedural default in cases of constitutional dimension or egregiousness remains in effect. *See French*, 7 P.3d at 131 (applying the procedural default rule to petitioner's ineffectiveness claim because "[n]one of these omissions constitutes ineffectiveness so egregious and of such constitutional dimensions that it may not be precluded")

FN6. The Arizona Supreme Court's 1992 comment to rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant

'knowingly, voluntarily and intelligently' waived the claim." Ariz. R.Crim. Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.

Given Arizona's exception for errors of "constitutional magnitude," the state court's finding of procedural default in Smith's case necessarily included an evaluation of the strength of his federal claim. Indeed, like the procedural rulings in *Ake*, *Park*, and *McKenna*, the state court's procedural ruling in this case was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude. Thus, federal review is not barred.

V.

[5][6] Smith contends that he is entitled to an evidentiary hearing to develop his ineffective assistance of counsel claim. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who ***1198** has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir.1994). [FN7] No court has given Smith an opportunity to develop a factual record on his Sixth Amendment claim.

FN7. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-9, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court held that petitioners must show cause and prejudice for failing to de lop

the material facts relating to a claim of ineffective assistance of counsel in state court. In his third Rule 32 petition, Smith attempted to develop the theory that his counsel provided ineffective assistance at sentencing. The court refused, however, to appoint a psychological expert to assist Smith in developing his argument. Despite Smith's attempt to have the court "consider his allegations of ineffective assistance," the court dismissed the claims without a hearing. Under these circumstances, Smith has satisfied the cause prong of *Tamayo-Reyes*. *See Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir.1997). The prejudice prong of *Tamayo-Reyes* is "coextensive with the prejudice prong of *Strickland*." *Correll*, 137 F.3d at 1414. For the reasons set forth below, we find that Smith has made a colorable claim of prejudice, and is therefore entitled to an evidentiary hearing on this question.

[7][8] To establish that his counsel was ineffective at sentencing, Smith must satisfy the standard the Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, he must show that his counsel's performance was deficient; that is, that it was "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. 2052. In addition to demonstrating counsel's deficient performance, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

[9] "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999), *cert. denied*, 527 U.S.

1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). As the Supreme Court recently made clear, counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *See Williams*, 120 S.Ct. at 1513-15 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation); *see also Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied*, --- U.S. ---, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (No. 00-110); *Caro*, 165 F.3d at 1225; *Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir.1998), *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir.1998), *cert. denied*, 525 U.S. 996, 119 S.Ct. 465, 142 L.Ed.2d 418 (1998).

There can be no doubt that Smith has asserted a colorable claim to relief entitling him to an evidentiary hearing. Smith alleges that his lawyer failed to investigate, let alone present evidence of, his miserable childhood, mental disabilities, and mental impairment at the time of the offense. The thin transcript of Smith's sentencing hearing reveals that his lawyer offered only the brief testimony of three lay witnesses who gave merely a vague description of his personality and childhood. When the time came to argue to the court that Smith's life was worth sparing, his lawyer asserted that the best mitigating factor in the case was Foreman's immunity agreement. Inexplicably, he also suggested that the court consider "how ***1199** Sandra Owen's [the victim] family has sustained a great loss" in deciding whether Smith deserved to be put to death. The lawyer then offered a rambling explanation of his moral opposition to the death penalty and promptly returned to the State's failure to prosecute Foreman. This was a woefully inadequate presentation in support of saving Smith from a sentence of death.

If Smith's allegations are true, his counsel's failure to conduct any investigation is particularly egregious in light of indications at the time of trial of the presence of a mental disability. We have explained that, "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting

strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995); *see also Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir.1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"), *cert. denied*, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998). This appears to be the case here. In a report assessing Smith's competency to stand trial, for example, Dr. Martin Levy noted that he had been hospitalized in a psychiatric unit and opined that, "Mr. Smith does have a history of psychiatric difficulties. Those difficulties have been primarily depressive in nature and have involved suicide attempts." Another report examining Smith's competency described him as "significantly anxious and depressed" and recommended further psychiatric evaluation.

The presentence report similarly signaled that Smith might have a mental disability. It noted that, as a child, Smith suffered from polio, a disease which can cause brain damage, and later underwent psychiatric treatment at a youth community mental health agency. It described Smith's numerous attempts to run away from his family beginning at age nine and his history of impulsive behavior. The report also revealed that Smith had used broken glass to cut through his skin and slash his veins in just one of several attempts to end his life. On another occasion, he shot himself in the stomach. Eventually, Smith began to abuse drugs, including LSD, marijuana, cocaine, psilocybin, heroin, PCP, and amphetamines. In conclusion, the report urged the court that, "[m]ental health counseling should be made available in the prison setting, keeping in mind that the defendant seems to be a high suicide risk." Rather than pursue an investigation, Smith's lawyers allegedly failed to develop any of this evidence, and in fact failed to either present argument relating to it or connecting it to any of Arizona's enumerated mitigating factors. We have previously found that the failure to present any argument based on a presentence report remarkably similar to the one in this case constituted deficient performance. *Smith*, 140 F.3d at 1269.

Smith alleges that his counsel would have uncovered substantial mitigating evidence if he had conducted an investigation. Smith has an IQ of 71, which is in the range of mental retardation. In a report prepared just two years after trial, moreover, Dr. David Gurland wrote that, "[i]n reviewing the data with regards to Mr. Smith, it becomes obvious that this is a man who is a marginally functioning individual who has been ever since his childhood." He noted that Smith was raised in a broken home and suffered both psychological and physical abuse. In commenting on his withdrawal from school in the eighth grade, Dr. Gurland wrote that, "[i]t is hard to know just how he managed to stay in school as long as he did." Smith's low I.Q. makes him "more of a follower than a leader. He is also easily influenced by others whom he may feel like him or admire him or want to be with him." Dr. Gurland concluded that the "patient should not, under the law, be given the death penalty as I think there are enough mitigating circumstances to, at worst, give him a life sentence." In addition to presenting ***1200** evidence that he suffered from a mental disorder, Smith also recounted to the district court that four inmates in a county jail took turns gang raping him when he was just eighteen years old. Smith's lawyer presented none of this powerful and potentially life-saving evidence at sentencing.

[10] Apart from allegedly failing to conduct any investigation into Smith's social and mental history, it appears from the transcript that his lawyer also failed to research the law on capital sentencing. In Arizona, a psychological disorder is a specifically enumerated mitigating circumstance. Ariz.Rev.Stat. § 13-703(G)(1). But when a report hinting at a possible mental impairment surfaced, Smith's lawyer minimized his client's mental disability and told the court, "I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated." It appears from this assertion that Smith's lawyer not only failed to recognize that a mental impairment could be mitigating, but also argued against his client's interests under the mistaken belief that the presence of a mental disorder was an aggravating factor. A misapprehension of the law that leads a lawyer to argue against his client's interests during the sentencing phase of a capital trial constitutes an "inadequac[y] in

rudimentary trial preparation and presentation" that falls outside the range of competent assistance. *Bean*, 163 F.3d at 1080; *see also Huynh v. King*, 95 F.3d 1052 (1996); *Scarpa v. DuBois*, 38 F.3d 1 (1st Cir.1994); *Morris v. California*, 966 F.2d 448, 454–55 (9th Cir.1991); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir.1987). In short, Smith has presented a colorable claim of counsel's deficient performance.

Smith has, moreover, made a "colorable claim" that his counsel's deficient performance prejudiced him. The Supreme Court recently held that an attorney's failure to conduct an investigation into a petitioner's abusive childhood, borderline mental retardation, and prison record satisfied *Strickland*'s prejudice prong. *See Williams*, 120 S.Ct. at 1515. This was because, as the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516; *see also Smith*, 189 F.3d at 1013 ("We previously have found Strickland's prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentence, despite the presence of aggravating factors."); *Correll*, 137 F.3d at 1413 ("[B]ecause trial counsel failed to represent any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice.") (quoting *Strickland*, 466 U.S. at 694-95, 104 S. Ct. 2052). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean* 163 F.3d at 1081; *see also Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir.1995). In this case, the prosecution argued that only one aggravating factor existed. In response, Smith's lawyer not only allegedly failed to investigate his horrific childhood, mental retardation and possible brain damage, but also failed to do basic legal research. Smith has not only presented abundant evidence of deficient performance, but also of prejudice. There can be no question that he has satisfied the standard for obtaining an evidentiary hearing.

VI.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand so that the district court can determine whether Smith's allegations that his attorney neither investigated his mental condition nor presented adequate mitigating psychiatric testimony during the sentencing phase are true and, if so, ***1201** whether he was denied effective assistance of counsel.

Concurrently herewith we file a memorandum disposition in which we affirm the petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[Filed Oct. 31, 1996]
Clerk, U.S. District Court
District of Arizona
By SMS Deputy

ROBERT DOUGLAS SMITH,	)	No. CIV 87-234-TUC-RMB
Petitioner,	)	
vs.	)	ORDER
SAMUEL E. LEWIS, et al.,	)	
Respondents.	)	

Before the Court is Petitioner Robert Douglas Smith's Supplemental Habeas Claim and Request For Expert Witness Fees. At issue is whether Smith's ineffective assistance counsel claims are procedurally barred with no exception available. Respondents move to deny the relief sought. After a review of the pleadings and record, the Court concludes that the claims are procedurally defaulted with no cause and prejudice shown. No fundamental miscarriage of justice will occur by the dismissal of this Petition.

Procedural Background

Smith was represented at trial by Thomas Hippert, an assistant public defender. A new assistant public defender, Lawrence Fleischman, represented Smith during his 1982 direct appeal. The Arizona Supreme Court affirmed Smith's conviction and death sentence. *State v. Smith*, 138 Ariz. 79, 86-87, 673 P.2d 17, 24-25

(1983), *cert. denied*, 465 U.S. 1074 (1984). In 1984, Fleischman field an petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. One ineffective assistance of trial counsel claim was raised relating to Hippert's failure to object to the trial court's reliance on hearsay evidence in the presentence report. The trial court found the claim precluded under Rules 32.2(a)(2) and (a)(3), waived for lack of objection at the sentencing hearing and meritless for reasons detailed in its April 17, 1985 Minute Entry. The Arizona Supreme Court denied review without comment.

In 1989, assistant public defender, John Palumbo filed a second Rule 32 petition while simultaneously acting as Smith's attorney in his federal habeas petition. No claims of ineffective assistance of counsel were raised. All claims were found precluded. The Arizona Supreme Court again denied review without comment. The United States Supreme Court denied certiorari.

While briefing was being completed by Palumbo on Smith's federal habeas petition, the Court received a letter directly from Smith expressing his desire to raise an ineffective assistance of counsel claim. Because the Public Defender's Office had represented Smith at all stages of his litigation, the Court determined that this was an issue Arizona should address. Hence, the Court allowed Smith to pursue that claim in state court while simultaneously proceeding with the briefing of his other federal habeas claims before this Court. On September 5, 1996, the Court denied those claims but allowed Smith to supplement his petition with the ineffective assistance of counsel claims presented to the state courts.

The trial court dismissed Smith's third Rule 32 petition on October 24, 1995 and denied a motion for rehearing on December 20, 1995. The Arizona Supreme Court denied review without comment.

Discussion

First, Petitioner asserts his ineffective assistance of counsel claims are not procedurally barred because the state court ruled on the merits. The Court disagrees.

On October 24, 1995, the trial court ruled:

> This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.
>
> The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material issue of fact or law exists which would be served by any further proceedings. Therefore,
>
> IT IS ORDERED dismissing the petition.
>
> This order is based on the following findings:
>
> The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.
>
> The claims are so old they are (1) *precluded by failure to bring them previously, in accordance with Rule 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).*

Minute entry dated October 24, 1995 (emphasis added). It is clear that the trial court found the claims precluded as a matter of state law.

Smith subsequently filed a motion for rehearing. It is this second minute entry which Smith asserts the trial court ruled on the merits of his claims thereby preserving them for federal habeas review. In denying the motion for rehearing, the state court found "The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffectiveness of counsel, or considered it, thought counsel ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous." Minute Entry of December 20, 1995. This language does nothing more than track the language of the October 24, 1995 minute entry. The language in both minute entries does nothing more than elaborate, albeit colorfully, why it dismissed Smith's third Rule 32 "due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner." Minute Entry of October 24, 1995. Smith's ineffective assistance of counsel claims were dismissed expressly for failing to conform the to the requirements of Arizona procedure. Accordingly, Smith's ineffective assistance of counsel claims are procedurally barred.

The Court may address the merits of the procedurally defaulted claims if Smith can show cause for the procedural default and actual prejudice therefrom. *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.), *cert. denied*, 116 S.Ct. 980 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). To demonstrate cause, Smith must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A showing that the factual or legal basis for a claim was not reasonably available to counsel or some interference by officials making counsel's compliance with the state procedural rules impracticable would constitute cause. *Id.* Lacking cause and prejudice, the Court may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of "one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 864, 130 L.Ed.2d 808 (1995).

Smith contends that the following supports a finding of cause: (1) the Public Defender's failure or refusal to challenge the conduct of a member of its own staff; (2) the Public Defender's failure to investigate and present psychological evidence; and (3) the ineffectiveness of appellate counsel. The Court finds that these allegations do not establish cause. Because Hippert simply chose to pursue evidence that was readily available and did not present an available claim does not establish cause. *Carrier*, 477 U.S. at 486, 106 S.Ct. at 2644 (counsel's failure to recognize the factual or legal basis for a claim or failure to raise the claim despite recognizing it does not constitute cause). Similarly, attorney ignorance or inadvertence in failing to raise certain claims in his state appeal is not "cause". *Id.* at 488. Thus, the mere fact that Fleischman did not raise any ineffective assistance of counsel claims in the direct appeal is not cause. Moreover, in reviewing the merits of Smith's federal habeas petition, this Court found no constitutional error. *See* Amended Order of September 5, 1996. The Public Defender's Office would have had no basis to challenge the conduct of a member of its own staff who applied sound trial strategy or elected to pursue one claim over another.

The record also does not support a finding that Smith's execution would constitute a fundamental miscarriage of justice. To be actually innocent of the death penalty, Smith must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S.333, ___, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992). The fundamental miscarriage of justice exception applies to the sentencing phase of a capital trial to one who is "actually innocent" of the death penalty. *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). A valid claim under this exception, however, is extremely rare. *Schlup*, 513 U.S. at ___, 115 S.Ct. at 864.

Today, Smith requests expert witness fees to allow him to be examined by a psychologist in order to demonstrate that he is actually innocent of the death penalty. He hopes to prove that such an examination will establish a single significant mitigating factor justifying the imposition of a life sentence. This request for a favorable hindsight evaluation is speculative. But more importantly, additional

mitigating evidence is not available to prove actual innocence for the death sentence under this exception. The actual innocence requirement focuses on the elements of eligibility, such as the existence of at least one aggravating factor, "and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error." *Sawyer v. Whitley*, ___ U.S. at ___, 112 S.Ct. 2523. Thus, the Court agrees with Respondents that Smith offers nothing to rebut the presumption that he is eligible for Arizona's death penalty beyond a reasonable doubt and that the death sentence is appropriate in his case. *See State v. Smith*, 138 Ariz. 79, 86-86, 673 P.2d 17, 23-24 (1983).

Conclusion

IT IS ORDERED that Petitioner Robert Douglas Smith's Request for Expert Witness Fees is DENIED;

IT IS FURTHER ORDERED that Respondent's Motion to Deny Expert Witness Fees and to Dismiss all Supplemental Habeas Claims is GRANTED and Petitioner Robert Douglas Smith's Petition for Habeas Corpus is DENIED WITH PREJUDICE and hereby DISMISSED.

Dated this 30 day of October, 1996.

S/_____
Richard M. Bilby
Senior United States District Judge

APPENDIX C

ARIZONA SUPERIOR COURT, PIMA COUNTY

Honorable Michael J. Brown
J U D G E

CASE NO. C R - 0 5 6 6 9

DATE October 24, 1995

Court Rptr: None

STATE OF ARIZONA

Plaintiff

vs.

ROBERT DOUGLAS SMITH

Defendant

EVENT SUMMARY

Type: in chambers ruling re Rule 32 petition
Result: completed

MINUTE ENTRY

IN CHAMBERS RULING RE RULE 32 PETITION:

Defendant nor counsel are present.

This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.

The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material

issue of fact or law exists which would be served by any further proceedings. Therefore,

IT IS ORDERED dismissing the petition.

This order is based on the following findings:

The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel, or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.

The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

cc:
Hon. Michael J. Brown
Court Adminsitrator
County Atty's Office
S. Jonathan Young, Esq.
Public Defender - John Palumbo
Appeals

L. McCormick, Deputy Clerk

APPENDIX D

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL BROWN CASE NO. CR-05669

Court Rptr: NONE DATE DECEMBER 20, 1995

THE STATE OF ARIZONA

vs.

ROBERT DOUGLAS SMITH

Defendant(s)

EVENT SUMMARY

Type: IN CHAMBERS Result: Defendant's Motion for Rehearing - Denied

MINUTE ENTRY

IN CHAMBERS

Counsel's assertion on page 4, lines 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed . . . to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client

in an appellate matter from examining in detail whether or not there is a colorable claim for ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.

IT IS HEREBY ORDERED Defendant's Motion for Rehearing is denied.

Copies to:

Hon. Michael Brown
Criminal Calendar
S. Jonathan Young, Esq.
John Palumbo, Esq., Public Defender's Office
Eric J. Olsson, Asst. Attny. General
Pima County Attorney's Office

Judy Cyr, Deputy Clerk

APPENDIX E

Supreme Court
STATE OF ARIZONA
402 ARIZONA STATE COURTS BUILDING
1501 WEST WASHINGTON
PHOENIX, ARIZONA 85007-3329
TELEPHONE: (602) 542-9396

NOEL K. DESSAINT
CLERK OF COURT

KATHLEEN E. KEMPLEY
CHIEF DEPUTY CLERK

May 22, 1996

RE: STATE OF ARIZONA vs. ROBERT DOUGLAS SMITH
Supreme Court No. CR–96–0148–PC
Pima County No. CR–05669

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 21, 1996, in regard to the above-referenced cause:

ORDERED: Petition for Review by the Supreme Court = DENIED.

Record returned to Pima County Superior Court: PSCS: Instruments and MEs (combined 3 parts)

NOEL K. DESSAINT, Clerk

TO:
Hon. Grant Woods, Attorney General ATTN: Paul J. McMurdie, Esq.
And Eric J. Olsson, Esq.
S. Jonathan Young, Esq.
Robert Douglas Smith, D.O.C. #45044, Arizona State Prison-Florence
Hon. Michael J. Brown, Presiding Judge, Pima County Superior Court
James N. Corbett, Clerk, Pima County Superior Court
Denise I. Young, Esq., Arizona Capital Representation Project

APPENDIX F

[Filed September 28, 1983]

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee, v. ROBERT DOUGLAS SMITH, Appellant.	)	No. 5595

Appeal from the Superior Court of Pima County

Cause No. CR–05669

The Honorable Michael J. Brown, Judge

AFFIRMED

Robert K. Corbin, The Attorney General — Phoenix
By William J. Schafer III and Barbara A. Jarrett,
Assistant Attorneys General
Attorneys for Appellee

Frederic J. Dardis, Pima County Public Defender — Tucson
By Lawrence H. Fleischman, Assistant Public Defender
Attorneys for Appellant

CAMERON, Justice

Defendant, Robert Douglas Smith, was tried before a jury and convicted of first degree murder, A.R.S. § 13–1105, kidnapping, A.R.S.

§ 13–1304(A)(3), and sexual assault, A.R.S. § 13–1406. In addition, the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious physical injury, A.R.S. § 13–604. Defendant was sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13–4031 and 13–4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

II. Did the trial court lack venue over the homicide charge?

III. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

IV. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

V. Is the Arizona death penalty statute unconstitutional?

VI. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VII. Is there a right to have a jury participate in sentencing where the death penalty is imposable?

VIII. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

IX. Did the trial court err in placing limits on recross-examination?

X. Were defendant's statements voluntary?

XI. Did the prosecutor's closing argument contain fundamental error?

XII. Did the trial court err in failing to instruct the jury on second degree murder?

XIII. Did the trial court properly exclude from evidence an exculpatory hearsay statement made by the defendant to a police officer?

XIV. Is imposition of the death penalty foreclosed in this case by Enmund v. Florida?

XV. Does the court find in its independent review that the death penalty was appropriate in this case?

XVI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The first eight issues raised in this appeal have been decided and discussed in the companion case of State v. Lambright, ____ Ariz. ____, ____ P.2d ____ (No. 5594, filed this date). A summary of the facts necessary for the determination of this appeal is also contained in that opinion.

IX. LIMITATION OF RECROSS-EXAMINATION

Defendant asserts that the trial court erred in limiting his right to recross-examine the state's key witness, Kathy Foreman. The control of cross-examination is left to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing from the record of an abuse of discretion. State v. Thomas, 110 Ariz. 106, 109, 515 P.2d 851, 854 (1973). Further,

> The right of confrontation and cross-examination of adverse witnesses is of fundamental importance, but it is not a right without limitation. It is well established in Arizona, as well as in many other jurisdictions, that there is no right to re-cross unless some new issue arises during redirect; otherwise, it is a matter of the trial court's sound discretion. (Citations omitted.) State v. Jones, 110 Ariz. 546, 550, 521 P.2d 978, 982, cert. denied 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed.2d 280 (1974), quoted in State v. Williams, 113 Ariz. 14, 16, 545 P.2d 938, 940 (1976).

In the instant case the judge offered the defendant a full opportunity to recross-examine the witness on any new areas brought out on redirect, and because he was tried together with another defendant, he also gave him the opportunity to conduct recross on any new point opened up on cross-examination by the co-defendant. Defendant's counsel declined to specify any new areas he wished to inquire into on recross-examination, so the trial judge did not permit recross-examination to proceed.

> A party has no right to use further cross-examination to repeat or re-emphasize matters already covered on direct or cross-examination. The court may inquire into the nature and purpose of the further cross-examination to determine whether to permit it or limit its scope. State v. Loftis, 89 Ariz. 403, 405–06, 363 P.2d 585, 587 (1961).

We find no error.

X. VOLUNTARINESS OF STATEMENTS

Robert Smith was arrested at about 9:00 a.m. on 14 March 1981 at an apartment complex in South Houston, Texas. He as arrested by officer John W. Laird of the Texas Department of Public Safety, who was accompanied by Robert petty, another Texas DPS officer, and two South Houston policemen. Officer Laird read Smith his Miranda rights, and Smith acknowledged that he understood them. No questions were asked at the time of arrest. Smith was taken to the South Houston Police Department, and a magistrate was summoned. The magistrate advised Smith of the charges against him, and read him his constitutional rights a second time. Defendant then agreed to talk to agents Laird and Petty. The officers told him that Kathy Foreman had admitted her participation in the crimes and had implicated Smith. The officers also explained the nature of the charges against Smith. Smith then made his first confession. In this first statement, Smith set forth the basic facts surrounding this crime, including his substantial involvement in the incident. In this first statement he told authorities that Kathy Foreman was the person who actually stabbed the victim.

Officer Laird told Smith the story just did not sound right somehow, and asked if he was sure it was the truth. Smith then became somewhat emotional, and said he had lied in order to protect his friend Lambright.

He then made a second statement, which paralleled the first one except that Smith now stated it was Lambright who stabbed the victim, and that both Lambright and Foreman cut the victim's throat. After the second statement Smith asked if he could see his wife. The officers granted the request and arranged for her to come down and see him. He visited with his wife and her mother for approximately an hour. The officers went in and out of the room several times as they got food and beverages for themselves and Smith. The officers testified that while they were in the room the defendant and his wife were talking about religion, and they observed the defendant crying.

After seeing his wife, Smith met with Laird and Petty again, and gave them a third statement which was similar to the second statement, but which was far more detailed. The defendant also expressed

willingness to give a written statement. Two days later he did give a written statement to the Texas authorities, after being given another set of constitutional warnings.

Defendant's final statement was made in Arizona to detective Gary Dhaemers of the Pima County Sheriff's Department. He agreed to answer questions in a taped interview. A transcript was made of the interview, which the defendant was given the opportunity to review, correct, and sign. The trial judge found that each of Smith's confessions was voluntary and admissible.

As we noted in State v. Lambright, supra, filed this date,

> The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at "voluntariness" hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal, absent clear and manifest error. (Citations omitted.) State v. Arnett, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), quoted in State v. Osbond, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). Accord State v. Dalglish, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982).

No clear and manifest error is present in the instant case. We do not find the circumstances surrounding the giving of these confessions to have been inherently coercive. Nor do we find it was improper, as suggested by defendant, for the officers, when explaining the charges against Smith, to accurately inform him that he had been implicated in the crime by Foreman.

Defendant further alleges as specific error the fact that detective Dhaemers brought the transcript of the last confession directly to Smith for his review, instead of delivering it to his attorney. It is apparent, however, that when Dhaemers delivered the transcript to Smith for his corrections and signature, he fully apprised the defendant of his right to have counsel assist him. In officer Dhaemers' uncontradicted testimony, he stated:

Well, I had gone through [the transcript] as best I could, and then I took it over to the jail and asked Mr. Smith if he wanted the opportunity to go through the transcript of the tape that he had given to me.

He indicated that he did. He wanted to go through it.

I advised him he had the right to have an attorney with him. He already had an attorney appointed to him and if he wanted that attorney there, he could have him there before we went through the statement and reviewed it.

He indicated to me that his attorney said that—had told him not to talk to anybody, but he wanted to talk to us and he wanted to go through his statement, his attorney would be mad at him because he did this, but he wanted to do this anyway.

This is not a case in which the police resorted to subterfuge in an attempt to deprive the defendant of his right to counsel, See Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Here it is clear Smith was offered the assistance of his appointed counsel to review the transcript, and he validly waived it. Nor is this a case in which the defendant ever invoked his right to have counsel present during questioning, or expressed his desire to deal with the police only through counsel. See Edwards v. Arizona, 451 U.S. 477, 484–85, 101 S.Ct. 1880, 1884–85, 68 L.Ed.2d 378, 386 (1981). In any event, we also note that the defendant made only minor typographical changes to the draft in question, which would have been admissible with or without defendant's corrections and signature, and which was cumulative of numerous other valid confessions. We find no error.

XI. PROSECUTORY CLOSING REMARKS

The defendant raises on appeal the following remark made by the prosecutor in his closing argument, in regard to the role of defense counsel. The prosecutor stated:

Looking at jobs, Mr. Hippert's job was to get his client off. That's it. My job is to produce this evidence and argue from it and ask you to convict for a crime which Mr. Smith should not be let go. Mr. Hippert is asking you to let him go, to let him walk out of the courtroom after being involved in the things he did.

This remark was made in response to the following statement in defense counsel's closing argument:

Now [the prosecutor], when he was standing up here said that your job or your purpose is to apply the law to the case.

Well, his job is to make things easy for the government, to grease the wheels * * *.

Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error. State v. Denny, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978); accord State v. Young, 116 Ariz. 385, 386, 569 P.2d 815, 816 (1977) ("failure to object to a closing argument is a waiver of any right to review an appeal unless so prejudicial as to deny the defendant a fair trial.") It is also apparent that any error was invited by defendant. As we said in State v. Marvin, 124 Ariz. 555, 558, 606 P.2d 406, 409 (1980),

> We have recognized that improper remarks by the prosecution, if they are provoked by opposing counsel or are in retaliation for certain statements, are not grounds for reversal unless they are so prejudicial as to constitute reversible error. (Citations omitted.)

See also State v. Bowie, 119 Ariz. 336, 343, 580 P.2d 1190, 1197 (1978) ("In this case, the error, if any, in the prosecutor's comments, was invited by the defense counsel's closing argument. The appellant may not benefit from an error which he invited."); accord, State v. Purcell, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977). Thus under both the waiver and invited error doctrines, the above comments of the

prosecutor do not require reversal unless they constitute fundamental error.

We are unable to find that the remark by the prosecutor in the instant case constitutes fundamental error. This remark was not of a highly prejudicial nature, so likely to inflame or bias the jury as to deny defendant his right to a fair trial. Even under the higher standard of scrutiny applied in cases where the question of a prosecutor's allegedly improper comment has been properly preserved for appeal, we would be unable to say this comment "probably influenced the jury's verdict." See State v. Sullivan, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981), quoting State v. Sustiata, 119 Ariz. 583, 594, 583 P.2d 239, 250 (1978). We find no reversible error.

XII. FAILURE TO INSTRUCT ON SECOND DEGREE MURDER

The defendant asserts that the trial court erred in failing to instruct the jury on second degree murder. In cases which may result in the death penalty, the trial judge is required to instruct on lesser included offenses when the evidence would have supported such a verdict, regardless of whether requested to do so by the defendant. State v. Vickers, 129 Ariz. 506, 513, 633 P.2d 315, 322 (1981), citing to Beck v. Alabama, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The defendant argues that parts of his confession could have been interpreted to suggest a lack of premeditation by him, and thus the evidence could have supported a verdict of second degree murder. The trial judge apparently felt the confessions fairly read did not tend to negate the element of premeditation, as he rejected this argument and refused the instruction.

To support an instruction for second degree murder, the evidence reasonably construed "should tend to show lack of premeditation." State v. Moreno, 128 Ariz. 257, 261, 625 P.2d 320, 324 (1981). All of the relevant evidence at trial suggests that the kidnapping was still in progress at the time of the killing; there was no suggestion that Ms. Owen was free to leave at the time Smith began choking her. Furthermore, the uncontradicted evidence before the jury, including Smith's own statements, established that the reason for the killing was

to prevent Ms. Owen from pressing charges of kidnapping and rape, and that the co-defendants knew this was the reason when they proceeded to kill her. The choking of Ms. Owen by Smith was the first of the acts in the sequence of stabbing, cutting and crushing with a rock that led to her death. Under these circumstances, we do not believe that the evidence supports a claim of lack of premeditation on Smith's part. We hold that the trial court did not abuse its discretion in refusing the requested instruction.

XIII. HEARSAY STATEMENT TO OFFICER

Defendant argues that it was error for the court to refuse to admit into evidence an exculpatory hearsay statement made by the defendant to a police officer. Defendant suggests that the statement is admissible under either of the residual hearsay exceptions, Rules 803 (24) and 804 (b) (5), Arizona Rules of Evidence, 17A A.R.S.

Each of those residual exceptions require the out of court statement to have "equivalent circumstantial guarantees of trustworthiness" as the other stated hearsay exceptions. Id. In State v. Spratt, 126 Ariz. 184, 187, 613 P.2d 848, 851 (App. 1980), our Court of Appeals held that a defendant's out of court assertion of his innocence lacked equivalent sufficient circumstantial guarantees of trustworthiness to make it admissible under the residual exception of Rule 804 (24), and therefore the statement was properly excluded. Similarly in State v. Duffy, 124 Ariz. 267, 275, 603 P.2d 538, 546 (App. 1979), the court held that the trustworthiness of defendant's self-serving out of court statements was "highly suspect," and therefore the trial court properly denied their admissibility. In the instant case the trial judge specifically stated as the reason for his ruling,

> * * * I'm going to deny the admission under either Exception 5 to Rule 804 or Exception 24 to Rule 803 on the grounds that it does not have the circumstantial guarantees of trustworthiness [or] that it is a statement sufficiently against his interest to bring it within the ambit of the rule.

We find no error.

XIV. PROPRIETY OF SENTENCE UNDER ENMUND v. FLORIDA

The defendant claims that the death penalty is impermissible in this case under the rule announced in Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which places limits on the imposition of the death penalty based on accomplice or felony murder theories. The United States Supreme Court held in Enmund that imposition of the death penalty would violate the Eighth and Fourteenth Amendments where the defendant did not kill, attempt to kill, or intend to kill. Defendant argues that because his case was submitted on both premeditation and felony murder theories, the jury's verdict of guilty of first degree murder does not establish that he killed, attempted to kill, or intended to kill.

In State v. McDaniel, ___ Ariz. ___, ___, 665 P.2d 70, 81 (1983), we stated,

> We agree with the defendant's claim that in first degree murder cases where the jury is instructed on felony murder as well as premeditated murder, a general verdict finding the defendant guilty of first degree murder does not establish whether the defendant had in fact killed, attempted to kill, or intended to kill.

In order to insure compliance with the specific requirements of Enmund, we instructed our trial courts,

> * * * that in future cases where the jury might have found the defendant guilty of first degree murder based on a felony-murder theory, the trial judge must determine beyond a reasonable doubt prior to imposing a sentence of death that the defendant killed, attempted to kill or intended to kill. Id. at ___, 665 P.2d at 81.

Although the trial in this case took place prior to State v. McDaniel, supra, the trial judge made findings in his Special Verdict of the type contemplated in that opinion. The trial judge held,

> THE COURT DOES FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, ROBERT DOUGLAS SMITH, COMMITTED THE OFFENSE OF MURDER WITH * * * PREMEDITATION.
>
> THE COURT FURTHER FINDS while this defendant was legally accountable for the conduct of another under the provisions of A.R.S. 13-303, this defendant's participation was not min[o]r, but was MAJOR and that in addition thereto, that this defendant planned and premeditated the killing and consummated the act. * * *
>
> THE COURT FURTHER FINDS that this defendant did foresee that his conduct would cause the death of another person; that he deliberately intended to cause that death. * * * (Emphasis in original.)

The trial court clearly found that defendant both killed and intended to kill. The trial judge made specific findings that Smith and Lambright discussed killing the victim, that the killing commenced when Smith began strangling the victim, and that Smith held the victim while she was being stabbed. We have reviewed the record and find the evidence supports these findings. Because the defendant participated in the killing, and intended to kill, the death penalty is not impermissible under Enmund v. Florida, supra.

XV. INDEPENDENT REVIEW

In each death penalty case we conduct an "independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances[,]" and then "determine for ourselves if the latter outweigh the former when we find both to be present." State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976).

For the reasons stated today in State v. Lambright, we agree with the trial court that the aggravating circumstance set out in A.R.S. § 13-

703 (F) (6) was established, as the offense was committed in an especially cruel manner. The victim was made to suffer great mental anguish and physical pain prior to her death. Defendant Smith shares full responsibility for the cruelty toward Ms. Owen. In fact, he was the one who repeatedly raped the victim prior to murdering her. Cruelty was clearly established.

The evidence suggesting Smith also had a heinous and depraved attitude toward the crime is equivocal. The only evidence of a heinous and depraved attitude on the part of Smith was the uncorroborated testimony of Kathy Foreman that Smith was the person who requested that the tape "We Are the Champions" be played. Although admitting much of his participation in the crime, Smith denied this. On the other hand, there is evidence that Robert Smith tried to commit suicide soon after returning to Texas, both as a result of remorse over this crime, and a marital breakup prior to the trip. We find that the evidence presented does not establish beyond a reasonable doubt that Smith had a heinous and depraved attitude toward the crime.

The principal mitigation urged by defendant was minor participation in the crime. This assertion was rejected by the trial court, and is also rejected by this court, for the reasons stated in the previous discussion regarding Enmund v. Florida. He further argues that the giving of a felony murder instruction in this case should be considered as mitigating. "The giving of a felony murder instruction is a mitigating circumstance only where there is some doubt as to defendant's specific intent to kill the victim. State v. Schad, 129 Ariz. 557, 574, 633 P.2d 366, 383 (1981), cert. denied 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982)." State v. Gillies, ___ Ariz. ___, ___, 662 P.2d 1007, 1020 (1983). Accord State v. Zaragoza, 135 Ariz. ___, ___, 659 P.2d 22, 29 (1983). This asserted mitigation therefore does not apply to this defendant.

There was some testimony from family members that the defendant had polio as a small child which may have caused him some physical and brain damage, although the statutory mitigating circumstance of A.R.S. § 13-703 (G) (1), substantial impairment of mental capability to appreciate wrongfulness of conduct or to conform conduct to the law,

was not established in this case. The court does take notice that the defendant has a low intelligence; the last time his I.Q. was tested before he left school it measured seventy one, or approximately at the second percentile. Some of the testimony also suggested a troubled home life as a youth, and learning difficulties in school.

The court has also considered his lack of prior record of serious crime, the evidence suggesting remorse by defendant, his favorable adjustment to a new marital and parental responsibility in the months preceeding [sic] his arrest, and the treatment accorded Kathy Foreman as further mitigation.

Having considered all the mitigation presented, we find that although it is significant, it is not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the instant crime. The death penalty was properly imposed in this case.

XVI. PROPORTIONALITY REVIEW

In cases where the death penalty is imposed we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendants." State v. Richmond, supra, 114 Ariz. at 196, 560 P.2d at 51.

For the reasons stated in State v. Lambright, we find that the disposition accorded Kathy Foreman, although disturbing, is not alone sufficient to require reversal of defendant's sentence.

This court must also look to the disposition of persons involved in other similar crimes. For the reasons stated in State v. Lambright, we find the disposition in this case to be proportional to the disposition of the following similar cases in which the death penalty was imposed, State v. Jeffers, ___ Ariz. ___, 661 P.2d 1105 (1983); State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980); State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980); State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); and not inconsistent with the following cases in which leniency was

granted, State v. McDaniel, ___ Ariz. ___, 665 P.2d 70 (1983); State v. Graham, ___ Ariz. ___, 660 P.2d 460 (1983); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). Again, we believe that overall the penalty imposed in this case is proportional to the penalty imposed in similar crimes.

We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

FELDMAN, Justice, concurring in part; dissenting in part

I concur in the portion of the opinion affirming the conviction. My views on the use of dual juries are contained in my concurrence to State v. Lambright, ___ Ariz. ___, ___ P.2d ___ (1983) (No. 5594, filed this date).

I dissent from that portion of the opinion affirming defendant's sentence to death. The trial court found that Smith was a participant in the killing. However, the record indicates and the majority

acknowledges that it was Lambright who used the knife and it was Lambright who "finished off" the victim by hitting her over the head with a rock. Smith claims that his participation in the act of murder was only minor and that the killing was done by Lambright and Kathy Foreman.

The trial court's findings are contrary to Smith's contentions. The trial court found beyond reasonable doubt that Smith, with premeditation, participated in the killing, that he helped to plan it, and that his participation in the actual act of murder "was MAJOR." (Emphasis in original.) Ordinarily, if the trial judge's findings are supported by the evidence we could affirm or, in a capital case where we are making ain independent review, we could agree. I cannot agree in this case. On this record, the trial court's findings are necessarily based upon the testimony of Kathy Foreman. Evidently the trial judge believed her testimony. He certainly had a better opportunity than I to determine the credibility. It may well be that she told the truth. However, her motives for lying are clear. By testifying that both Lambright and Smith planned and took a major part in the crime, she has seen to their conviction and to the imposition of the ultimate sentence. By doing this, she has earned immunity for herself, avoided the death penalty, and has not served even a day in jail.

The trial judge and the members of this court are "disturbed" and "appalled" by the treatment afforded Ms. Foreman. I join them in this. I am also appalled, however, by the fact that in the face of the many mitigating circumstances detailed by the court, including his low I.Q., Smith has been sentenced to death on the uncorroborated testimony of a witness whose motive for lying is patent. If the testimony given by Kathy Foreman is true, then Smith merits the death penalty. If, however, Kathy Foreman did not tell the truth, Smith does not merit the death penalty. No member of the majority has ever seen Kathy Foreman, but each member of the majority recognizes her motive to lie and each member of the majority is appalled. In my view, no decision on life or death should be allowed to stand on so fragile a foundation.

For this reason, I believe that the court should exercise its discretion in performing its duty of independent review by reducing Smith's sentence to life without possibility of parole for 25 years.

STANLEY G. FELDMAN, Justice

APPENDIX G

[Filed September 28, 1983]

IN THE SUPREME COURT OF THE STATE OF ARIZONA
In Banc

STATE OF ARIZONA, Appellee, v. JOE LEONARD LAMBRIGHT, Appellant.	)	No. 5594

Appeal from the Superior Court of Pima County

Cause No. CR–05669

The Honorable Michael J. Brown, Judge

AFFIRMED

Robert K. Corbin, The Attorney General — Phoenix
By William J. Schafer III and Barbara A. Jarrett
Assistant Attorneys General
Attorneys for Appellee

Thomas G. Martin — Tucson
Attorney for Appellant

CAMERON, Justice

Defendant, Joseph Leonard Lambright, was tried before a jury and convicted of first degree murder, A.R.S. § 13–1105, kidnapping, A.R.S. § 13–1304(A)(3), and sexual assault, A.R.S. § 13–1406. In addition,

the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious physical injury, A.R.S. § 13–604. Defendant was sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13–4031 and 13–4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

II. Did the trial court lack venue over the homicide charge?

III. Were defendant's statements voluntary?

IV. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

V. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

VI. Is the Arizona death penalty statute unconstitutional?

VII. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VIII. Is there a right to have a jury participate in sentencing where the death penalty is imposable?

IX. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

X. Does this court find in its independent review that the death penalty was appropriate in this case?

XI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The facts necessary to a determination of this appeal are as follows. In February and March, 1980, Joseph Lambright, Robert Smith, a friend of Lambright's, and Kathy Foreman, Lambright's girlfriend, took a cross country driving trip. Beginning in Texas, where they resided, they first drove to Florida, returned to Texas, and continued on to Arizona. The trip was financed with muggings or purse-snatching and some occasional work. During the trip Lambright and Foreman were sexually involved, and frequently had intercourse in Smith's presence; sometimes this occurred in the car while Smith was driving.

When the group arrived in Arizona, they camped in the mountains outside Tucson. Lambright and Foreman again engaged in intercourse in the presence of Smith, and Smith became angry. He complained that Lambright had all the sex he wanted. Lambright asked why Smith "didn't go out and find somebody." Smith said it "wasn't so easy" and began walking off. The two men then walked away together and talked for several minutes.

The next day, 11 March 1980, the three went into Tucson and were having coffee at a Hobo Joe's restaurant, when Smith once again indicated he wanted a woman. At this point Foreman left to use the restroom. As she was returning, she testified that she overhead Lambright saying to Smith that Lambright "would like to kill somebody just to see if he could do it." When Foreman inquired moments later what was going on, Lambright told her that they were going to go out and find somebody for Smith.

Lambright drove the group around Tucson for some time, and at approximately 3:30 p.m. they saw a young woman, the victim Sandy Owen, hitchhiking. They stopped and picked up the victim, who seated herself in the unoccupied back seat and said she wanted a ride to the food stamp office. They drove to the food stamp office, but when they arrived there they did not permit Ms. Owen to leave the car. Instead Lambright drove to the back of the building, got out of the car and jumped into the back seat with Ms. Owen. He told her to "shut up and be quiet and she wouldn't get hurt."

Smith got out of the front passenger's seat and into the driver's seat. He pulled the car away and began looking for the freeway. Foreman turned around and saw that the victim looked frightened, and appeared to be trembling. Foreman asked the victim how to get to the interstate. Smith told the victim to shut up, because she would not tell them the truth. They found Interstate 10, and proceeded northwest toward California. Lambright searched though [sic] the victim's purse, found a bottle of pills, and asked what they were for. The victim stated they were part of a mental therapy she was undergoing.

At some point Owen stated that she needed to use a restroom. They pulled the car off to the side of the interstate, and told her she could relieve herself behind some trees. Lambright had the victim take her shoes off so she would be unable to get away, and had Kathy Foreman accompany her to make sure she did not try to run. The group got back into the car, now with Lambright driving and Smith in the back seat. Smith put a blanket and some clothes over the rear windows, and proceeded to rape the victim. When he had finished he snickered and said she had small breasts.

The car proceeded through Pinal County, turned off the interstate and proceeded to some isolated mountains. Ms. Owen asked if her captors were going to release her, and they told her they would take her back and let her go. They left the car at the end of a dirt road and walked part way up one of the mountains to a level area, arriving near dusk. After building a fire, Lambright and Foreman had intercourse, and a few feet away Smith again raped the victim.

Smith then began choking Ms. Owen. She collapsed, and Smith retained his grip on her as she fell. Lambright stated the woman had to be killed, or else she could press charges for kidnapping and rape. Lambright took Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm. Foreman testified that after the stabbing Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with the knife; Foreman claimed that only Lambright cut the victim's neck, Smith claimed that it was done by both Lambright and Foreman, and Lambright claimed he could not remember who used the knife during the killing. The victim remained alive, and was at least semi-conscious, as she attempted to raise herself up on one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock he yelled "Die, bitch."

Jewelry was taken from the victim's body, and then rocks were piled on top of her. Lambright, Smith, and Foreman returned to the car and washed the blood off their hands. As they got back into the car and began driving to San Diego, the group engaged in a macabre celebration, playing a tape of music entitled "We Are the Champions." When they arrived in San Diego, they pawned a wedding ring belonging to Ms. Foreman. They continued on to Anaheim, California, to Las Vegas, Nevada, and then returned to Texas, where they were apprehended approximately a year later after a tip to police from someone who had been told about the crime. Each of the three persons made statements to the police.

The Pima County Attorney's Office decided to charge Lambright and Smith for their participation in the crimes, and to grant immunity to Foreman in return for her testimony. Lambright and Smith were extradited to Pima County and tried for kidnapping, sexual assault, and first degree murder. The case was assigned to the Honorable Michael V. Brown of the Pima County Superior Court. In light of the defendants' confessions, which were not totally interlocking, and the appearance of potentially antagonistic defenses, Judge Brown severed the cases of Lambright and Smith. Because most of the evidence was

relevant to both defendants, however, the judge decided to hold a single "dual jury" trial, in which two separate juries were empaneled, each to decide the guilt or innocence of only one defendant, and each permitted to hear only evidence admissible against that one defendant. The defendants were each convicted of first degree murder, kidnapping, and sexual assault, and both appeal their convictions and sentences. We examine Robert Smith's convictions and sentences in State v. Smith (No. 5595), filed this day. In the instant case we consider the convictions and sentences of Joseph Lambright.

I. DUAL JURIES

In the pre-trial stages it appeared to the trial judge that this case could present problems under the doctrine of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). Bruton prohibits the introduction of a defendant's statements to incriminate a codefendant in a joint trial, where the declarant is unavailable for cross-examination due to the assertion of his fifth amendment right to silence. In the instant case, the state intended to use statements of both Smith and Lambright at trial, and each of these statements incriminated both the declarant and the codefendant. Moreover, although the statements were substantially "interlocking," which might have allowed their admission under the exception to Bruton created in Parker v. Randolph, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), the confessions did not overlap in all respects. After considering the confessions, and finding it impractical to attempt to edit out the portions incriminating the other defendant, the trial judge decided to sever the two cases. See Rule 13.4, Arizona Rules of Criminal Procedure, 17 A.R.S. However, because most of the evidence was admissible against both defendants, and because the trial was expected to last over a week and included several out-of-state witnesses, rather than hold separate trials the judge decided to conduct a single trial using two juries.

Under this "dual jury" procedure, two juries were chosen from separate venires, each to decide the guilt or innocence of only one defendant. The trial was held in a courtroom in the federal courthouse in Tucson which was large enough to accommodate both juries. The two juries were kept physically separated, and were carefully instructed

not to speak with persons on the other jury. When information relevant to both defendants was being presented, both juries remained in the courtroom. When evidence admissible against only one defendant was being presented, the jury for the other defendant was excused. When both juries were present, one sat in the jury box and the other sat in designated rows of chairs on the other side of the courtroom. The positions of the respective juries were alternated daily. Separate opening and closing arguments were made, each in front of one jury only. The juries were given separate instructions, and then sent to deliberate separately. When the first jury reached a verdict, it was not made public until the deliberations of the other jury had concluded. In the instant case both defendants were convicted on all counts, and each defendant assigns as error the use of the dual jury procedure.

It appears that a number of courts have approved the dual jury procedure. See, e.g. United States v. Hayes, 676 F.2d, 1359, 1366–67 (11th. Cir.), cert. denied ___ U.S. ___, 103 S.Ct. 455, ___ L.Ed.2d ___ (1982); United States v. Rimar, 558 F.2d 1271 (6th Cir.), cert. denied sub nom. Rimer v. United States, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978); United States v. Rowan, 518 F.2d 685, 689–90 (6th Cir.), cert. denied sub nom. Jackson v. United States, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975); People v. Wardlow, 118 Cal.App.3d 375, 382–387, 173 Cal.Rptr. 500, 502–05 (1981); People v. Brooks, 92 Mich.App. 393, 285 N.W.2d 307 (1979). These cases generally find that this procedure satisfies the defendants' constitutional rights as well as the end of judicial economy. See also United States v. Sidman, 470 F.2d 1158 (9th Cir. 1972), cert. denied 409 U.S. 1127, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973) (holds procedure satisfies each of defendant's constitutional rights, including rights to impartial jury and due process). In addition to complying with the formal confrontational requirements of Bruton, the procedure may effectively avoid the "spectacle" of antagonistic defenses. People v. Brooks, supra, 92 Mich.App. at 396, 285 N.W.2d at 308.

Besides the courts which generally approve the dual jury procedure, there are courts which have given limited approval to the procedure, suggesting that appropriate guidelines be developed before the procedure is put into common use. See, e.g. United States v. Sidman,

470 F.2d 1158, 1170 (9th Cir. 1972); State v. Watson, 397 So.2d 1337, 1342 (La. 1981), cert. denied 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

Some other courts have discouraged or disapproved of future use of the procedure, finding the risks of error inherent in the procedure too great. See, e.g. People v. Williams, ___ Ill.2d ___, ___ N.E.2d ___, slip op. at 4–7 (No. 51870, filed 16 April 1982), rev'd on other grounds 93 Ill.2d 309, 444 N.E.2d 136 (1982); Scarborough v. State, 50 Md.App. 276, 278–281, 437 A.2d 672, 674–76 (1981); State v. Corsi, 86 N.J. 172, 430 A.2d 210 (1981). The principal risk of this procedure appears to be that while both juries are present, there may be some unintentional disclosure or reference to information admissible against only one defendant which may constitute reversible error. The Illinois Supreme Court stated, "It is the possibility that inadvertent revelations will disclose to the separate juries the inadmissible evidence which concerns us." State v. Williams, supra, quoted in People v. Rainge, 112 Ill.App.3d 396, ___, 445 N.E.2d 535, 550 (1983). This risk is demonstrated by United States v. Sidman, supra, in which such an error actually occurred. During trial an inadvertent Bruton problem arose when in the presence of both juries the prosecutor was allowed to question a witness regarding a statement of defendant Sidman which incriminated both himself and his co-defendant. Although Sidman's conviction was affirmed, the co-defendant had to be retried.

Although implied authority for a multiple jury procedure has been found under Rule 14, Fed. Rules Crim. P., 18 U.S.C., governing severence [sic] of parties and offenses, United States v. Rowan, supra, 518 F.2d at 690, and under state rules with similar wording, People v. Church, 102 Ill.App.3d 155, 163–165, 429 N.E.2d 577, 584–85 (1981); State v. Corsi, supra, 86 N.J. at 175, 430 A.2d at 212–13, no such authority can be found in the Arizona Rules of Criminal Procedure. Specifically, our rule governing severence [sic], Rule 13.4, Ariz. Rules Crim. P., 17 A.R.S., does not contain explicit authority for such a procedure, nor does it provide trial judges the broad discretion to "provide whatever other relief justice requires" as does the federal rule. Furthermore, our rules do not contain a provision analogous to Rule 57 of the Federal Rules of Criminal Procedure, which grants broad power

to "proceed in any manner not inconsistent with these rules * * *." Cf. United States v. Sidman, 470 F.2d at 1170 (suggests district courts have authority to establish guidelines for multiple jury procedure under Federal Rule Crim. P. 57).

In Hare v. Pima County Superior Ct., 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982), we recently pointed out,

> Following the adoption of the amended 1960 state constitution, this court was given exclusive power to make rules relative to all procedural matters in any court. Ariz. Const., art. 6, § 5, Subsec. 5, added 1960; State v. Blazak, 105 Ariz. 216, 462 P.2d 84 (1969). We have held that this rule-making power may not be supplemented or superseded by a Superior Court. Anderson v. Pickrell, 115 Ariz. 589, 566 P.2d 1335 (1977). We reenforced this constitutional position when we adopted Rule 36, Arizona Rules of Criminal Procedure, 17 A.R.S. (1973):
>
> "Any court may make and amend rules governing its practice not inconsistent with these rules. No such rule shall become effective until approved in writing by the Supreme Court."
>
> This rule allows adoption of local rules of practice and procedure, but only with our approval. * * *

We further stated:

> * * * Nothing we say here should discourage courts, through the adoption of local rules, to carry out experiments which may improve the judicial process. Indeed, these efforts should be encouraged. But local rules must first be approved by this court * * *. Id. at 543, 652 P.2d at 1390.

It is clear that the "experiment" conducted in the instant case was unauthorized by this court. We thus must consider the question of prejudice to the defendant.

The authorities to date, including those cases which disapprove future use of the multiple jury procedure, are unanimous in refusing to reverse a conviction merely based on the use of this procedure, without some specific showing of prejudice. While it has been found that this procedure involves an inherent risk that prejudicial error may occur during the trial, the procedure itself has not been found to be prejudicial. Defendant's conviction has been uniformly upheld where the courts are unable to find any specific prejudice to the defendant. See United States v. Hays (11th Cir.), supra; United States v. Rimar (6th Cir.), supra; United States v. Rowan (6th Cir.), supra; United States v. Sidman (9th Cir.), supra; People v. Wardlow (Cal.App.), supra; People v. Williams (Ill.), supra; People v. Rainge (Ill.App.), supra; People v. Church (Ill.App.), supra; State v. Watson (La.), supra; Scarborough v. State (Md.App.), supra; People v. Brooks (Mich.App.), supra; State v. Corsi (N.J.), supra; State v. Hernandez, 163 N.J.Super. 283, 394 A.2d 883 (App.Div. 1978) (involving three juries). See also People v. Smith, 94 Ill.App.3d 969, 419 N.E.2d 404 (1981) (finds no prejudice resulted from dual jury procedure, but reverses conviction on other grounds).

Defendant in the instant case can point to no specific error occurring at trial. The trial judge was meticulous in explaining the procedure to the jurors, properly admonishing the jurors, keeping the juries separated, and keeping the juries from being exposed to inadmissible material. Defendant argues that the judge erred in giving the jurors the following explanation for the procedure:

> For some legal reasons the evidence that the State will present, some of the evidence is admissible against Mr. Smith and not against Mr. Lambright; some of the evidence is admissible against Mr. Lambright but not against Mr. Smith.
>
> For that reason you are one of two juries that will be chosen this afternoon.

A substantially similar instruction was given to each jury. Defendant claims this instruction may have caused improper speculation o part of the jurors. We believe that the above explanation of the procedure was more likely to reduce rather than increase speculation by

the jurors. See also State v. Corsi, supra, 86 N.J. at 178–179, 430 A.2d at 213 (assertion that dual jury procedure causes speculation in the minds of the jurors rejected as a grounds for reversal). Furthermore, to the extent that through this explanation the jury became aware that there is evidence which they will not hear for legal reasons, we note that this occurs numerous times during the usual criminal trial whenever the judge sustains an evidentiary objection.

The main thrust of defendant's argument is that the dual jury procedure is inherently prejudicial breeding confusion and speculation in the minds of the jury. We join the overwhelming authority to the contrary, however, and find that the procedure is not inherently prejudicial. In light of the severity of the penalty in this case, we have reviewed the trial record with great care. We find no reversible error in the instant case.

We do not intend the current disposition to be taken as an approval of future use of this procedure. As noted above, because this procedure is unauthorized by our rules, trial courts must obtain the approval of the Supreme Court before conducting further trials in this manner. If proposed guidelines are presented for approval, we will then consider whether they successfully minimize the risks of this procedure while maintaining the benefit of conserving judicial resources.

We note that although courts have utilized the dual jury procedure in other murder cases, see e.g. People v. Church, supra; State v. Corsi, supra, including one in which the death penalty was given and affirmed, see State v. Williams, supra, we feel that death penalty cases are inappropriate vehicles for experimentation with new procedures, and the practice should be avoided in the future.

II. Venue

Article 2, § 24 of the Arizona Constitution provides, "In criminal prosecutions, the accused shall have the right * * * to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. * * *" This provision is carried into effect by A.R.S. § 13–109 which specifically provides,

§ 13–109. Place of trial

A. Criminal prosecutions shall be tried in the county in which conduct constituting any element of the offense or a result of such conduct occurred, unless otherwise provided by law.

B. The following special provisions apply:

1. If conduct constituting an element of an offense or a result constituting an element of an offense occurs in two or more counties, trial of the offense may be held in any of the counties concerned; * * *. (Emphasis added.)

It is clear that the actual killing in this case took place in Pinal County. The defendant argues that venue on the homicide charge was improper in Pima County, where the trial was held.

The murder charge was based on both premeditation and felony murder theories. As to felony murder, our statute provides,

§ 13–1105. First degree murder; classification

A. A person commits first degree murder if:

* * *.

2. Acting either alone or with one or more other persons commits or attempts to commit sexual assault under § 13–1406, * * * [or] kidnapping under § 13–1304 * * *, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

Under this felony murder theory, the underlying felonies of kidnapping and sexual assault were elements of the first degree murder charge. It is clear that the kidnapping of Sandra Owen originated in Pima County. The uncontested evidence demonstrates that Sandra Owen was

abducted in the parking lot of a food stamp office in Tucson, Pima County. The only counterargument offered is that Ms. Owen voluntarily got into the automobile when she was first picked up hitchhiking. Under our criminal code,

A person commits kidnapping by knowingly restraining another person with the intent to

* * *

3. Inflict death, physical injury or a sexual offense on the victim, * * *. A.R.S. § 13–1304.

Further, our statutes provide that "Restraint is without consent if it is accomplished by: (a) Physical force, intimidation or deception; * * *." A.R.S. § 13–1301 (2) (a). The uncontradicted evidence established that when the car reached the parking lot, Ms. Owen was not permitted to leave the car, but was forced to remain when Lambright jumped into the seat next to her, warned her to "shut up and be quiet and she wouldn't get hurt," and the car sped off with Smith at the wheel. Thus, the kidnapping began in Pima County. In addition, the evidence supports the trial judge's conclusion that the initial sexual assault, which took place while the car was in motion on Interstate 10, occurred while the defendants were still in Pima County. Because acts comprising an element of felony murder occurred in Pima County, venue was proper in Pima County under A.R.S. § 13–109, supra.

Because we have decided that venue was proper under a felony murder theory, we need not decide whether the evidence suggesting premeditation in Pima County was also sufficient to establish venue. See State v. Poland, 132 Ariz. 269, 275–76, 645 P.2d 784, 790–91 (1982) (evidence of premeditation in Yavapai County sufficient to support venue under A.R.S. § 13–109). Cf. State v. Cox, 25 Ariz.App. 328, 331–32, 543 P.2d 449, 452–53 (1975) (forming of intent did not satisfy "overt act" requirement of former venue statute A.R.S. § 13–131).

III. VOLUNTARINESS OF STATEMENTS

Defendant Lambright was arrested at approximately 9:30 a.m. on 14 March 1981 at his place of work, Midway Auto Sales, located on Highway 62 in Orange County, Texas. The officers involved with the arrest were Thomas Latta, Assistant Chief Deputy of the Orange County Sheriff's Department, Bruce Simpson, Captain, Deputy Sheriff of the Orange County Sheriff's Department, Winston Padgett, a detective with the Texas Department of Public Safety who had worked on the investigation, and John Hebert, a Louisiana State Police trooper who had also helped in the investigation. Lambright was properly advised of his Miranda warnings at the time of the arrest, and he indicated he understood them. He was not questioned at that time. The officers transported Lambright to the Orange County Sheriff's Office, where he was booked and then permitted to make phone calls. When he had finished his phone calls, he was interviewed beginning around 10:15 a.m. He spoke to officers Padgett and Simpson for approximately forty-five minutes, and then spoke to officer Hebert for another forty-five minutes. During this period defendant was not handcuffed, and was permitted to smoke cigarettes and drink coffee. He gave a detailed account of the crime, including his participation in it, except that he said he "couldn't remember" who actually wielded the knife.

The trial judge held these statements were voluntary. As we said in State v. Arnett, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), "[T]he State must show 'by a preponderance of the evidence' that the confession was freely and voluntarily made. The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at 'voluntariness' hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal absent clear and manifest error." (Citations omitted.) Quoted in State v. Osbond, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). Accord State v. Dalglish, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982). We are unable to find any clear and manifest error in the instant case. There was nothing inherently coercive regarding these interviews, considering the time of day,

duration, number of officers involved, or any other surrounding circumstances.

At the voluntariness hearing Lambright testified that during the drive to the sheriff's office one of the officers conspicuously displayed a gun and said that it could make a big hole in a person. This was specifically denied by each of the police officers who rode in the car with Lambright. Lambright also stated that when he was permitted to telephone his sister and his boss, he asked those persons to arrange to get him a lawyer, and Lambright believed that the officers overheard these requests. Each of the arresting officers denied overhearing any such conversation. Lambright further claimed that at the beginning of the interview he stated that he thought he should talk to an attorney. Officer Padgett, who was the first person to enter the room and began the interview, denied at trial that defendant ever made such a statement. Finally, Lambright claimed that the officers alluded to another case involving multiple defendants and stated that the first person to confess got a better deal. Each of the three officers who interviewed the defendant denied making such a reference or hearing any other officer make such a reference.

After hearing this conflicting testimony the trial judge found these statements were voluntarily given. The trial judge had an opportunity to assess directly the demeanor of the witnesses and determine their credibility. After hearing the witnesses, the trial judge was free to reject the allegations of the defendant in favor of the facts as related by the officers. We are unable to find clear and manifest error in the admission of these oral statements given to the police.

After concluding the oral statements, Lambright was asked if he would make a written statement. He agreed to do so, and was read his rights again. He had just begun to write out a statement when he was interrupted by the arrival of a judge at approximately 12:10 p.m. to secure a waiver of extradition which Lambright had indicated he was willing to give. The judge gave Lambright an additional Miranda warning, and then read him a statement regarding extradition. Lambright then asked some complex questions regarding the extradition process. The judge responded that he could not give

Lambright legal advice, and without Lambright requesting one, the judge decided to provide Lambright an attorney, and called an attorney on the telephone. After talking with the lawyer, Lambright told the judge and officers present that the attorney had told him not to make any further statements. All questioning ceased, and Lambright was transferred to the County Jail.

After extradition had been arranged, Gary Dhaemers, homicide detective with the Pima County Sheriff's Department, went to Texas in May 1981 to return Lambright to Arizona. Dhaemers told Lambright at the outset that he would not talk to him about the case because Lambright had an attorney. When they arrived in Tucson and were entering the holding area of the court building, Lambright stated to Dhaemers "I probably owe you a complete confession." The trial court properly found this spontaneous remark which was unsolicited and clearly voluntary to be admissible. We find no error in the trial court's determination of the admissibility of his statements to the police.

IV. ASSOCIATE OF PROSECUTOR AS WITNESS

Defendant argues that the trial court erred in allowing a member of the Pima County Attorney's Office to testify. The defendant generally objected to Deputy County Attorney Paul Banales' testimony concerning Kathy Foreman's story of the crime because of "the fear that the jury will consider the testimony of a prosecutor to be more credible than that of the other witness[es]." The context of Banales' testimony here, according to the defendant, renders this fear particularly palpable. Banales testified at trial that Kathy Foreman's story never varied in its particulars before and after he granted her immunity. According to the defendant, Banales' testimony thus had a substantial impact on a key issue in the case – the credibility of the prosecution's eye witness.

The defendant did not object at trial to Banales' specific comment regarding the consistency of Foreman's story, and we do not believe that admitting the comment was error. That Foreman was an interested witness is beyond dispute; her immunity from prosecution was contingent on her testifying against the co-defendants, as the jury was

advised. The credibility of a witness and the weight and value to be given her testimony are questions for the trier of fact. State v. Spoon, No. 5224, filed 6 July 1983, slip op. at 14; State v. Pieck, 111 Ariz. 318, 529 P.2d 217 (1974). The jury would have considered the conditions under which Foreman testified, as well as Banales' comment, in deciding how much credence to give her testimony. We believe on review of the evidence that Banales' testimony had little impact on a jury that assessed first-hand the credibility of a witness subjected both to direct examination and to searching cross-examination by two defense attorneys. Moreover, the jury knew that Banales was involved in the early stages of the instant proceedings, and had made the offer of immunity. It therefore knew that the "corroboration" implicit in Banales' statement was from a source interested in the outcome of the trial. We believe, therefore, that the jury was able to place Banales' remark in context, and to accord it the appropriate weight.

As to the general contention that a prosecutor's testimony is inherently prejudicial to a defendant because of the status of the witness, we have said that the weight and credibility to be accorded to witnesses who are involved in upholding the law are jury matters. See Baumgartner v. State, 20 Ariz. 157, 178 P. 30 (1919); Duff v. State, 19 Ariz. 361, 171 P. 133 (1918). In the instant case it was not the prosecutor who was trying the case who appeared as a witness, but another person from the same office, who was not participating in the trial. The concerns we have about the county attorney also being a material witness in the crime he is prosecuting do not apply in this case. We find no error.

V. FAILURE TO GIVE JURY INSTRUCTIONS

The next allegation of error concerns the trial court's failure to give defendant's requested jury instruction no. 10, which read:

> There are two defendants. You must consider the evidence in the case as a whole. However, you must consider the charge against each defendant separately. You must not be prejudiced

against one defendant simply because you determine that the State has proved its case against another defendant.

The failure to give instructions which are not correct statements of the law or do not fit the facts of a particular case is not error. State v. Axley, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982); State v. Reinhold, 123 Ariz. 50, 57, n. 4, 597 P.2d 532, 539, n. 4 (1979); State v. Rhymes, 107 Ariz. 12, 14, 480 P.2d 662, 664 (1971). The above instruction to the jury that it "must consider the charge against each defendant separately" was an incorrect statement of the law given the dual jury procedure. The trial judge correctly pointed out that each of the juries in this case were supposed to consider the charges against only one defendant, not to consider the charges against each defendant separately. This instruction was an incorrect statement of the law, had the potential for confusing the jury, and therefore was properly refused.

We also note that the trial judge correctly instructed the jurors,

> The only matter before you for your decision is the guilt or innocence of the particular defendant.

"If the substance of the proposed instruction is adequately covered by instructions actually given by the court, there is no error in their being refused. State v. Cookus, 115 Ariz. 99, 563 P.2d 898 (1977)." State v. Gretzler, 126 Ariz. 60, 89, 612 P.2d 1023, 1052 (1980). Accord State v. Melendez, 121 Ariz. 1, 5, 588 P.2d 294, 298 (1978).

VI. CONSTITUTIONALITY OF ARIZONA DEATH PENALTY STATUTE

Defendant claims that the Arizona death penalty statute, A.R.S. § 13–703, is unconstitutional in that it is cruel and unusual punishment contrary to the eighth amendment. This issue has been resolved adversly [sic] to defendant's position on numerous occasions. State v. Gretzler, ___ Ariz. ___, ___, 659 P.2d 1, 12, cert. denied ___ U.S. ___, 103 S.Ct. 2444, ___ L.Ed.2d ___ (1983). See also State v. Gillies, ___ Ariz. ___, ___, 662 P.2d 1007, 1014 (1983); State v. Woratzeck, 134 Ariz. 452, 456, 657 P.2d 865, 869 (1982).

VII. VALIDITY OF STATUTORY AGGRAVATING CIRCUMSTANCE OF "HEINOUS, CRUEL OR DEPRAVED"

Defendant also claims that the statutory aggravating circumstance prescribed by A.R.S. § 13–703 (F) (6), killing in an "especially heinous, cruel, or depraved manner," is unconstitutionally vague. We have considered and rejected this claim in prior cases. State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 9. See also State v. Jeffers, ___ Ariz. ___, ___, 661 P.2d 1105, 1131 (1983); State v. Zaragoza, ___ Ariz. ___, ___, 659 P.2d 22, 27 (1983).

VIII. RIGHT TO JURY SENTENCING

Defendant asserts that he has a right to have a jury participate in sentencing when the death penalty is a possible outcome. This assertion has also been rejected by the court numerous times. State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 15. See also State v. Richmond, ___ Ariz. ___, ___, ___ P.2d ___, ___, slip op. at 5 (No. 2914, filed 12 May 1983).

IX. BURDEN OF PROOF ON MITIGATING CIRCUMSTANCES

Defendant also argues that placing the burden of proof on defendant to prove mitigating circumstances, see A.R.S. § 13–703 (C), violates due process. Several of our cases hold to the contrary. State v. Richmond, supra, slip op. at 5; State v. Blazak, 131 Ariz. 598, 602, 643 P.2d 694, 698 (1982); State v. Smith, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980).

X. INDEPENDENT REVIEW

In every case in which the death penalty is imposed we conduct an "independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances." State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976). We further "determine for ourselves if the latter outweigh the former when we find both to be present." Id.

In the instant case the trial judge found the evidence established the aggravating circumstance set out in A.R.S. § 13–703 (F) (6), that the "defendant committed the offense in an especially heinous, cruel, or depraved manner." Cruelty has been specifically defined to involve the infliction of pain on the victims. We have also stated that our concept of cruelty involves not only physical pain, but also mental distress visited upon the victims. State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 11. In State v. Tison, 129 Ariz. 526, 633 P.2d 335 (1981), we found cruelty based on the infliction of such emotional distress. There the victims were held by armed captors for an extended period, forced at gunpoint to move from place to place, and finally compelled to witness other family members being shot to death while awaiting their own executions. In this case the victim was abducted and driven away from the city in which she was picked up by her captors. She was described as being scared and trembling as she sat in the back seat of the car. During the drive she was sexually assaulted. She was then taken to an isolated location, and placed in obvious fear for her life, as evidenced by her asking her captors if they intended to let her go. She was then sexually assaulted a second time before being killed. As was the case in State v. Tison, supra, we are able to find cruelty based on the "great degree of mental pain" inflicted on the victim during the course of this crime. 129 Ariz. at 543, 633 P.2d at 352.

In addition to the mental pain involved, the manner of killing was one which was physically painful to the victim. Ms. Owen was choked and then stabbed in the chest and abdomen. The knife was twisted and turned while it was inside her. Her throat was then cut deeply. After these attacks she remained alive and was still conscious, as she raised herself up on one elbow when her assailants turned to leave. Lambright then returned and threw a large boulder down on her head. The victim, who was conscious during this series of violent attacks, must have suffered great physical pain. The statutory element of cruelty is established.

The statutory concepts of heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Poland, supra, 132 Ariz. at 285, 645 P.2d at 800; State v. Tison, supra, 129 Ariz. at 543, 633 P.2d at 352. The evidence also

supports a finding that Lambright had a heinous and depraved attitude during this crime. In State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 10–12, we identified specific factors which lead to a finding that the crime was committed in a heinous and depraved manner. One of these factors is the relishing of the murder. In State v. Clark, 126 Ariz. 428, 437, 616 P.2d 888, 897, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), we found the murderer had a depraved state of mind where he "kept a spent bullet as a grisly souvenir of his crime." In the instant case, when the defendant was arrested one year after the murder he was wearing a necklace with a charm that had belonged to Ms. Owen. When the authorities inquired about the charm, Lambright told them he "kept it as a m[e]mento of the trip." A heinous and depraved state of mind is also demonstrated by Lambright's participation in the macabre celebration of the killing during which the group played the song "We Are the Champions."[1] As mitigation the defendant presents his lack of a record of prior violent crime, an honorable discharge from the military, an asserted unsettled family life as a child, and the fact that Kathy Foreman was granted immunity for her testimony, which is discussed more fully infra. While we have considered all the mitigation suggested by defendant, we do not find it sufficiently substantial to outweigh the aggravating circumstance and to call for leniency. See A.R.S. § 13–703 (E). The death penalty was properly imposed in this case.

XI. PROPORTIONALITY REVIEW

In addition to conducting an independent review of the propriety of each death sentence, we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." State v. Richmond, supra, 114 Ariz.

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1. Because of the strong evidence cited above reflecting Lambright's heinous and depraved attitude toward the killing, we need not also rely on Foreman's uncorroborated testimony that Lambright stated before the crime he "would like to kill somebody just to see if he could do it," and said "Die, bitch" as he threw the rock on the victim's head.

at 196, 560 P.2d at 51. Accord State v. Gretzler, supra, ___ Ariz. at ___, 659 P.2d at 17.

Our initial inquiry is whether the disposition accorded to Kathy Foreman, who received immunity in return for her testimony against Lambright and Smith creates a disproportionate result. While a more lenient sentence received by an accomplice has been considered along with other mitigating circumstances in determining whether to impose the death penalty, see State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (leniency granted to accomplice together with numerous other mitigating circumstances sufficiently substantial to reduce death sentence to life imprisonment), our cases have held that the mere fact that an accomplice has received leniency does not in itself prevent the imposition of the death penalty.

In State v. Gillies, supra, where one defendant was tried and received the death penalty, and his accomplice plead guilty and was sentenced to life imprisonment, we noted that, "[a]ny resulting inequity between the two sentences is a consequence induced by our plea-bargaining system." ____ Ariz. at ____, 662 P.2d at 1022. Similarly, in State v. Gerlaugh, ___ Ariz. ___, 659 P.2d 642 (1983), in which defendant Gerlaugh was also tried and sentenced to death, it was noted that the charges against an accomplice were disposed of through a comprehensive plea agreement under which he was given life sentences on some of the charges together with a twenty-one year sentence on another charge. ____ Ariz. at ____, n. 1, 659 P.2d at 644, n. 1 (concurring opinion). More directly on point, in State v. Richmond, supra, another death penalty case, we specifically considered the fact "that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged." ____ Ariz. at ____, ____ P.2d at ____, slip op. at 14. In none of the above cases did we find that the prosecutorial discretion exercised toward other participants in the crime rendered improper the particular defendant's death sentence. Although Foreman managed to escape prosecution by offering her testimony in return for immunity, we note that the other person brought to trial in this case, Robert Smith, has been given the same sentence received by Lambright. While the disposition of other persons involved in the crime is an important factor in determining the proportionality of a capital

sentence, the court must also consider the propriety of the sentence in relation to the disposition of persons involved in other similar crimes.

Having reviewed other crimes involving the same aggravating circumstance found in the instant case, we find that the death sentence received by defendant Lambright is proportional to the disposition of the persons involved in those crimes. In State v. Jeffers, supra, State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980), State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980), State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1453, 55 L.Ed.2d 500 (1978), each of the defendants was convicted of a murder in which the sole aggravating circumstance was that the crime was found to have been committed in an especially heinous, cruel, or depraved manner under A.R.S. § 13–703 (F) (6), and each received the death penalty.

We find also that Lambright's sentence is not disproportionate to other cases in which this court has held that leniency was appropriate in light of more compelling mitigating circumstances than are present here. See State v. McDaniel, ___ Ariz. ___, ___ P.2d ___ (No. 4220–2, filed 28 April 1983) (defendant did not intend to kill); State v. Graham, ___ Ariz. ___, 660 P.2d 460 (1983) (substantial mental impairment due to medically-induced drug addiction, neurological problems, and brain damage; vulnerability to influence; lack of prior record of violence); State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982) (extreme youth of defendant – sixteen years old at the time of his crime); State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981) (convincing evidence of change of defendant's character and goals while in prison; youth of defendant; murder occurred as the result of a shootout begun by robbery victim); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979) (substantial mental impairment due to brain lesion).

While we believe that overall considerations of proportionality favor imposition of the death penalty in this case, we are disturbed by the treatment accorded Kathy Foreman. After viewing the evidence and hearing the testimony in this case, the trial judge concluded that Kathy Foreman was "equally guilty" with Smith and Lambright. By her own admission she assisted Smith and Lambright in restraining the victim when the car was stopped briefly, and she held one of the victim's arms

while she was being stabbed. Furthermore, it does not appear the information she had to offer was unique or essential. At the time she was granted immunity Lambright and Smith were already in custody for these crimes, and each had confessed.[2] Foreman did agree to try to lead authorities to the victim's body, but each of the other participants had already demonstrated a similar willingness by drawing maps for authorities to use in their search. After reviewing the record in this case the trial court stated that the granting of complete immunity to Kathy Foreman was "appalling." We agree. We must remind prosecuting attorneys that the favorable treatment accorded to an accomplice can, under different facts, be given weight in considering the proportionality of a capital sentence.

We have reviewed the record for fundamental error pursuant to A.R.S. § 13–4035, and find none.

The convictions and sentences are affirmed.

JAMES DUKE CAMERON, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

2. We are also unable to find circumstances surrounding these confessions which would cause a prosecutor substantial concern over their admissibility.

FELDMAN, Justice, specially concurring

I concur with the result and with much of the reasoning contained in the opinion. I write because I disagree with the court's conclusion that the use of dual juries was equivalent to the adoption of a local rule without sanction of this court.

This record contains no hint that the Superior Court of Pima County has adopted a general procedure to be applied in cases with "Bruton problems" or in similar cases where the objective of efficient and prompt administration of justice conflicts with the necessity of providing defendants with a fair trial. The record does indicate that the trial judge correctly concluded that defendant's right to a fair trial required a severance. However, he was informed that if the two cases were severed, each trial would consume approximately three weeks and that the prosecution intended to call several out-of-state witnesses. Thus, successive trials would have resulted in a disproportionate expenditure of court, witness and jury time, with the attendant expense and inconvenience.

To handle this problem, the judge decided to sever the cases but to hold both trials at once, with two separate juries in the same courtroom. As the majority correctly indicates, careful precautions were taken and neither defendant was prejudiced in any manner. I see no reason to chastise the trial judge for using the procedure, nor any ground to conclude that he made some special rule of local procedure without sanction of the supreme court. More importantly, I see no reason to inhibit other trial judges from using innovative techniques when required in a particular case in order to meet the ever-growing problems of the system.

Rule 36, Rules of Criminal Procedure, 17 A.R.S. (1973), should be interpreted to require advance consent by this court only for the adoption of "rules of court" which set standards of procedure to be applied to all cases or to all cases of certain classes. "A rule of court prescribes a procedural course of conduct that litigants are required to follow, the failure to comply with which may deprive the parties of

substantial rights." Hare v. Superior Court, 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982). What we have here is not a rule of procedure for litigants; it is an order – the exercise of an individual judge's discretion to use a particular technique in order to meet a specific problem. In my view, where the trial judge innovates in accomodating [sic] the requirements of a particular case, we are dealing with a discretionary function rather than with "rule making." Trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them. Schavey v. Roylston, 8 Ariz. App. 574, 575, 448 P.2d 418, 419 (1968) (Judge had inherent power to exclude spectators even though the rule permitting this had been repealed.), 20 Am.Jur.2d, Courts §§ 79 and 81. Such discretion – and thus the procedure adopted in the case at bench – is expressly recognized by Rule 611, Rules of Evidence, 17A A.R.S., which permits the trial court to "exercise reasonable control over the mode [of] . . . presenting evidence so as to . . . avoid needless consumption of time . . . ."

The court of appeals recently considered a procedure followed by a judge who allows jurors to submit questions for witnesses. State v. LeMaster, ___ Ariz. ___, ___ P.2d ___ (App. 1983) (No. 1 CA-CR 5881, filed July 15, 1983, review denied September 9, 1983). The court approved the procedure – properly in my view – even though it applied to all cases that come before the judge in question and is, therefore, much more of a "rule" than the "one-time" procedure followed in the case at bench. It was not and has never been suggested that a trial judge must get the approval of this court before deciding whether or how to allow jury questions to witnesses. The same may be said of methods of settling jury instructions, handling motions in limine, conducting pretrial conferences, holding settlement discussions, regulating argument, handling objections and numerous other aspects of trial procedure. In fact, no procedure exists whereby a trial judge can obtain the opinion of this court, in advance, before using some technique which, although not prohibited, is not expressly permitted by rule.

The inherent discretion of each trial judge to control his or her own courtroom is one of the strong points of the common law. Of course, we must draw the line where a trial judge institutes procedures contrary

to the rules or inconsistent with their spirit. At the same time, we must leave the trial judge free to adopt procedures and techniques for individual cases which present problems not specifically covered by the rules. I believe that this court should support such efforts and that the position taken today is a step backward.

STANLEY G. FELDMAN, Justice

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed May 15, 2001]
Cathy A. Catterson, Clerk
U.S. Court of Appeals

JOE LEONARD LAMBRIGHT, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	No. 96-99020 DC# CV-87-00235-TUC-RMB Arizona ORDER
ROBERT DOUGLAS SMITH, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 DC# CV-87-00234-TUC-RMB Arizona ORDER

Before: FERGUSON, REINHARDT, THOMPSON, Circuit Judges

The panel has voted to deny the petition for rehearing filed by the petitioners.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to hear the matter en banc.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX I

Comment to Rule 32.2(a)(3)

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must "knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

APPENDIX J

ARIZONA STATE LEGISLATURE
Fortieth Legislature - First Regular Session
Joint Interim Committee Meeting

JOINT LEGISLATIVE STUDY COMMITTEE
ON
POST CONVICTION RELIEF

Minutes of Meeting
Thursday, October 17, 1991
Senate Majority Caucus Room - 1:30 p.m.

Cochairman Krull called the meeting to order at 1:40 p.m. and the attendance was noted. It was noted that Tony Mackey was in attendance representing Judge Noel Fidel.

Members Present

Senator Blanchard
Senator Greene
Representative Noland

Karen Duffy
Jessica Funkhouser
Allen Gerhardt
Bruce Griffen
Chick Hastings
Nancy Kroger
Charles Krull, Cochairman
Paul McMurdie, Cochairman
Judge Ronald Reinstein
Judge James Sult
Natasha Wagner
Denise Young

Members Absent

Representative Eden
Judge Noel Fidel

Speakers Present

None

Cochairman Krull asked for a motion to approve the minutes of October 11, 1991. Ms Young stated that her opposition to Cochairman McMurdie's recommendation to remove the plea ability to appeal in capital cases out of the process was not included in the minutes. She moved, seconded by Cochairman McMurdie, that the minutes be approved as amended to note her opposition. The motion carried by voice vote.

Cochairmn [sic] Krull recounted that at the previous meeting, agreement was reached that in post conviction relief (PCR), Rule 32 and habeas corpus will still be included in any proposal.

Cochairman McMurdie stated that there are inconsistencies throughout the application of preclusion and he would like the Committee to address this issue.

Cochairman Krull indicated that if there is preclusion, the Committee should look at whether an attorney, in a prior PRC [sic], recognized an issue and made a voluntary decision not to raise it. He also said he feels that standards for the counsels involved in PCR representations should be addressed.

Senator Blanchard said he believes there are two issues involved: what the preclusion standards should be on the first petition and the successive petition issue which has its own set of preclusion rules.

Senator Greene asked if Ms Funkhouser is advocating changing the standard in Rule 32 that there would still be preclusion if a petition is brought on the grounds that counsel was incompetent.

Ms Funkhouser answered that there are constitutional issues that only the defendant himself can personally raise, and there are issue at trial that an attorney can decide that the defendant doesn't have to personally address. She said there is confusion occurring where the defendant didn't know about an issue but would have raised the issue if they had known about it, then it's not precluded. She stated she feels there should be a more meaningful definition of waivers.

Cochairman Krull said when a defendant files the first petition for PCR and the state pleads preclusion, it must be shown that the defendant suffered prejudice and can claim ineffective counsel because his counsel failed to raise that issue.

Cochairman McMurdie said he disagrees with Cochairman Krull. He said claiming ineffective counsel puts a unique burden on the defendant to show that it was ineffective and was prejudicial.

Ms Young said she disagrees with comments made by Ms Funkhouser and Cochairman McMurdie. She said the provisions are clearly stated and she doesn't see any problem in the way Rule 32 is now written.

Representative Noland asked Ms Young how frivolous, successive petitions are stopped. Ms Young answered that they should be denied on their merits.

Judge Reinstein said that he can deny quicker on preclusion than on merits. If he denies on merits, that gives the defendant an avenue in the federal court that he otherwise wouldn't have, which would delay the finality of a case. If he has questions, he will have an evidentiary hearing and decide on the merits.

Cochairman McMurdie said the preclusion rules are the only way the state courts can ensure that their judgments are carried out after giving the defendant trial protection, appellant protection and PRC [sic] protection.

Cochairman McMurdie said the Attorney General's proposal is to delete "knowingly, voluntarily and intelligently", so the rule would read "not raise a trial on appeal or in any previous collateral proceeding." For those constitutional claims that the U.S. Supreme Court said have to be individually waived by the defendant, they would be covered because the burden is on the state to show that he did it on that claim because it is required. But on those claims where it is just plain attorney error, if it's not raised, it's lost.

Chairman Krull noted that the Committee should be aware that the Arizona Judicial Council Post Conviction Relief Group strongly urges that the language not be deleted.

Cochairman McMurdie explained that the Arizona Judicial Council's position was based on *Fay v. Noia*. However, the U.S. Supreme Court overruled that provision in *Colman v. Thompson*, so whatever belief that the language was constitutionally required is no longer applicable and the state is entitled to have finality of judgment, and with the language there, he said he does not believe finality could ever be achieved.

Ms Young said *Fay v. Noia* is the standard that has to do with federal review of state cases, it has nothing to do with state review of their own case. State courts are applying the rule of preclusion and said she feels the language should not be changed.

Judge Sult asked Cochairman McMurdie if the Attorney General's Office was primarily concerned with second, third and fourth petitions for PRC [sic].

Cochairman McMurdie said they are very concerned with the second and successive petitions and because the Attorney General's Office deals primarily with death penalty cases, they are concerned with those cases where a great many issues are raised in a direct appeal and many issue are raised in the petition that were never raised at trial and never raised on direct appeal.

Judge Sult noted that those issues raised on direct appeal are immediately ascertainable and can be disposed of promptly through preclusion and asked if the Attorney General's Office is seeking a rule for an automatic cutoff by the judge.

Cochairman McMurdie answered in the affirmative.

Representative Noland advised that the issue of ineffective assistance of counsel has been raised and there has been much input from around

the state about finality and she stated the Legislature wants to deal with the issue.

Mr. Gerhardt replied to Representative Noland's question regarding dealing with incompetent counsel. He said, upon the determination that an attorney is ineffective, the Appellate Court will file a copy of its opinion with the State Bar and see that disciplinary proceedings are commenced.

Cochairman Krull noted that although the Court determines an attorney is ineffective in a particular case does not necessarily mean he is incompetent. Ms Funkhouser said that hardly anyone is ever found ineffective even though the County Attorney's Office receives three or four allegations every day which must be investigated. Cochairman McMurdie pointed out that claiming ineffective assistance of counsel is simply a means of getting around the preclusion rule.

Representative Noland pointed out a problem under the present statutes, stating a defendant has the opportunity to seek successive PRC'S [sic] if different alibis or different defenses can be raised and there is no finality. Cochairman Krull said that in his experience in Maricopa County, when additional avenues aren't presented to the lawyer by the client, successive post conviction reliefs are and should be precluded. Representative Noland answered she is receiving reports to the contrary.

Senator Greene said there are compelling arguments on both sides and recommended trying to find some middle ground. He indicated there is also the inference of waiver section that basically says on the second time around, the judge can infer the waiver if the person has been represented. He said that maybe if it's not inferred on the second time, it's presumption.

Senator Blanchard said there's two problems involved: lack of any time line and successive petitions. The remedy he is proposing, especially if there's a statewide post conviction remedy office, is to keep the "knowingly, voluntarily and intelligently" wording for the first time PCR, to impose some reasonable deadline on the filing of that first

PCR, and then impose time limits on successive PCR's. He said he feels this will add more finality for the victims and still keep the full avenue of relief available for the defendant in the first PCR where meritorious claims have at least two opportunities to be heard.

Ms Duffy asked Judge Reinstein if the ineffective issue is raised, must it be prejudicial. Judge Reinstein answered that the Arizona Supreme Court ruled that it wasn't before but it is now.

Cochairman Krull asked for comments on the suggestion discussed at the previous meeting of a 180-day time limit from either the date of the sentencing or the date of the mandate being issued by the Court of Appeals within which a PCR should be filed.

Ms Young said she feels 180 days is too short a period of time. She said a factor to be considered is that it takes 90 days if a certoria (CERT) petition is filed. She said that thought should be given, in the case where a CERT petition is involved, to imposing the time limit after a CERT decision is made.

Cochairman Krull noted that in his office, very few cases result in a CERT being requested from the U.S. Supreme Court. The problem that exists is that in a PCR, there are no records available as in an appellate case. A remedy would be a centralized PCR office which would reconstruct the record for counsel to review.

Senator Blanchard noted that a time deadline would provide a certain length of time for the defendant to decide whether or not to appeal, and if so, time for counsel to file, once counsel is appointed. He noted that a centralized PCR office provides the advantage of automatically providing materials accessible to counsel until the deadline is over.

Cochairman McMurdie said that discussion of time limits should seriously consider when the time limit should begin and for how long, and also the time that will be required by the PCR office to prepare the records. He said he likes the 180-day time limit which has been proposed.

Mr. Hastings said that if the Members agree on the recommendation of a statewide PCR office, then the Committee can start discussing fundamental changes.

Cochairman McMurdie raised the possibility of extending the time limit to one year if the time limit is set from the date of sentencing. He said he proposes 180 days if going from the mandate.

Ms Duffy recognized the need to allow the defendant the right to appeal, but she said one must also focus on the victim who suffers while awaiting the defendant's decision to appeal. Under the mandate, she said 180 days turns into five years which impacts on the victim's life.

Cochairman Krull said there's a misconception that most defendants wait until the last day to seek post conviction relief. In his experience, he said they generally seek it the first opportunity they can, the first time they are aware of the remedies available to them.

Ms Funkhouser said she would like a reasonable time frame such as 60 to 90 days from the date of sentencing to the time of requesting a lawyer, and then another year maximum for filing a petition.

Senator Blachard advised that he did not have time to chair the Subcommittee and recommended that another chair be appointed.

Cochairman McMurdie said that since most of the material on the agenda has been discussed, it is his recommendation that proposals be drafted by himself and Senator Blanchard, and distributed for review. He recounted that dialogue has covered successive petitions, notice to victims regarding each step, ensuring competent representation and whether to proceed by statute or rule.

Senator Blanchard also said the Committee can make a decision on the concept of the mandate or the sentence.

Mr. Hastings moved, seconded by Cochairman McMurdie, that further discussion be held pending review of written proposals. The motion carried unanimously.

After discussion, Cochairman Krull moved, seconded by Cochairman McMurdie, that the next meeting be set for Friday, November 15 at 10:00 a.m.

Without objection, the meeting adjourned at 3:45 p.m.

S/_____
Joanne Bell, Secretary

(Tapes on file in the Office of the Chief Clerk.)

jb
10/28/91

ORIGINAL

NO. 01-339

(4)

Supreme Court, U.S.
FILED
SEP 26 2001
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In the

Supreme Court of the United States

♦

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ROBERT DOUGLAS SMITH,

Respondent.

♦

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

♦

RESPONDENT'S BRIEF IN OPPOSITION

S. JONATHAN YOUNG*
WILLIAMSON AND YOUNG, P.C.
177 NORTH CHURCH AVENUE
SUITE 807
TUCSON, AZ 85701
(520) 792-3123

ROBERT J. HIRSH
HIRSH, BJORGAARD & ROGERS, P.L.C.
177 NORTH CHURCH AVENUE
SUITE 700
TUCSON, AZ 85701
(520) 624-4790

Attorneys for Respondent
**Counsel of Record*

53 pp

QUESTIONS PRESENTED

I

(A) DOES THE REQUIREMENT OF AKE V. OKLAHOMA, 470 U.S. 68 (1985), THAT A STATE PROCEDURAL RULE BE INDEPENDENT OF FEDERAL LAW TO CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND, APPLY IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. §2254?

(B) IS THERE A CONFLICT IN THE COURTS OF APPEALS ON THIS ISSUE?

(C) DOES THE NINTH CIRCUIT'S HOLDING THAT A DETERMINATION OF WHETHER A POST-CONVICTION CLAIM IS OF "SUFFICIENT CONSTITUTIONAL MAGNITUDE" IS NOT INDEPENDENT OF FEDERAL LAW UNDER AKE V. OKLAHOMA, SUPRA, CONFLICT WITH THE LAW OF THE SIXTH, SEVENTH AND TENTH CIRCUITS?

II

(A) DID THE NINTH CIRCUIT MISINTERPRET RULE 32.2(a)(3) AND ARIZONA LAW IN FINDING THAT APPLICATION OF THE RULE REQUIRES A DETERMINATION OF THE CONSTITUTIONAL MAGNITUDE OF A POST-CONVICTION CLAIM?

(B) DID THE NINTH CIRCUIT CORRECTLY HOLD THAT THE ARIZONA COURTS DID NOT CLEARLY AND EXPLICITLY RELY ON A PROCEDURAL RULE IN DENYING RESPONDENT'S INEFFECTIVENESS CLAIM, AND THAT THERE WAS THEREFORE NO INDEPENDENT STATE GROUND FOR THE DENIAL OF THE CLAIM?

(C) DID THE NINTH CIRCUIT ERR IN REFUSING TO CERTIFY A QUESTION OF ARIZONA STATE LAW TO THE ARIZONA SUPREME COURT?

III

HAS THE COMMON LAW PROCEDURAL DEFAULT RULE OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) BEEN SUPERSEDED, IN ARIZONA CASES, BY 28 U.S.C. § 2264, UNDER WHICH PETITIONER IS PLAINLY ENTITLED TO FEDERAL CONSIDERATION OF HIS CONSTITUTIONAL CLAIMS BECAUSE ARIZONA DID NOT AFFORD HIM THE POSTCONVICTION REPRESENTATION IT HAS OBLIGATED ITSELF TO PROVIDE IN ORDER TO "OPT IN" TO CHAPTER 154 OF THE AEDPA?

LIST OF PARTIES

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IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that Petitioner's Petition For Writ Of Certiorari to review the judgment below be denied.

♦

OPINIONS BELOW

The opinion of the Ninth Circuit Court Of Appeals appears at Appendix A to the Brief in Opposition and is reported at Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001).

The Order of the United States District Court of Arizona denying the Supplemental Petition appears at Appendix B to the Brief In Opposition and is unpublished. Smith v. Lewis, (No. CIV 87-234 TUC RMB filed October 31, 1996.)

The Decision of the United States District Court of Arizona denying the Amended Petition appears at Appendix C to the Brief in Opposition and is unpublished. Smith v. Lewis (filed September 5, 1996.)

♦

JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was March 6, 2001.

A Petition For Rehearing and Suggestion For Rehearing En Banc filed by Petitioner was denied by the Ninth Circuit Court of Appeals on May 15, 2001, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is under 28 U.S.C. §1254(1).

♦

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure:

Rule 32.2. Preclusion of remedy

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

• • •

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

Ariz. R.Crim.P. 32.2(a)(3).

2. Comment to Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure:

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must "knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, (sic) 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings (sic) is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

Ariz.R.Crim.P. 32.2(a)(3), cmt.

♦

STATEMENT OF THE CASE

On March 30, 1982, a Pima County, Arizona jury found Respondent and his codefendant, Joseph Lambright, guilty of the offenses of kidnapping, sexual assault and first degree murder of Sandra Owen on March 11, 1980. (Apps. E and F.) On May 27, 1982, the trial court sentenced Respondent to death on the murder conviction. (App. E.) Lambright was also sentenced to death. (App. F.) In companion decisions dated September 23, 1983, the Arizona Supreme Court affirmed the convictions and death sentences of both defendants. (Apps. E and F.)

On April 20, 1984, Respondent filed his first Petition For Post-Conviction Relief under Rule 32 of the Arizona Rules of Criminal Procedure ("Rule 32 Petition") in state court. (App. C at C-3.) The first Rule 32 Petition was denied on April 17, 1985, and the Arizona Supreme Court denied review. (Id.)

On April 14, 1987, Respondent filed a Petition For Writ Of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court for the District of Arizona in Tucson, Arizona. (Id.) Because the Petition continued a number of unexhausted claims on December 14, 1988, the District Court dismissed the Petition without prejudice so that Respondent could exhaust his unexhausted claims in state court. (Id.)

On December 8, 1989, Respondent filed his second Rule 32 Petition. (Id.) On August 8, 1991, the trial court denied the second Rule 32 Petition, and the Arizona Supreme Court denied review. (Id.) On January 3, 1994, Respondent filed an Amended Petition in District Court which included the claims raised in the second Rule 32 Petition. (Id.)

In all of the foregoing proceedings, Respondent was represented by attorneys of the Office of the Pima County Public Defender in Tucson, Arizona. (App. A at A-4.)[1] In September of 1994, Respondent wrote a letter to Judge Richard M. Bilby, the judge presiding over Respondent's federal habeas proceedings, and told him that he wished to raise claims of ineffective assistance of counsel relating to his trial and sentencing counsel, but that his present counsel, John Palumbo, had told him that he could not raise such a claim because trial counsel was a member of his Office. (Id. at A-4, A-5.) Respondent requested in the letter that Judge Bilby appoint an attorney to "work with" Palumbo and represent him on claims of ineffective assistance of counsel against his trial counsel. (Id. at A-5.) Judge Bilby granted Respondent's request and appointed undersigned counsel S. Jonathan Young, a private attorney, to represent Respondent on his ineffectiveness claims. (Id.)

[1] Thomas Hippert represented Respondent at trial and sentencing. Lawrence Fleicshman represented Respondent on direct appeal and the first Rule 32 Petition. John Palumbo represented Respondent on his second Rule 32 Petition and on his initial and Amended Habeas Petitions. (App. B at 1-2.)

On June 9, 1995, undersigned counsel Young filed a third Rule 32 Petition raising numerous claims and allegations of ineffective assistance of counsel by the Public Defender's Office, including a claim that Respondent's trial counsel rendered ineffective assistance during his sentencing proceedings. (Id.) The Petition contained an affidavit by John Palumbo that the Pima County Public Defender had a policy that prohibited its attorneys from alleging ineffectiveness of other attorneys in the office. (App. A at A-5.) The trial court denied the third Rule 32 Petition, however, and the Arizona Supreme Court denied review. (A at A-5; App. G; App H.)

On August 23, 1996, undersigned counsel Young filed a Supplemental Petition For Writ Of Habeas Corpus and Supporting Memorandum raising Respondent's ineffectiveness claims. (App. A at A-5; App. B)

In an Amended Memorandum Opinion And Order dated September 5, 1996, the District Court denied the Amended Petition For Writ Of Habeas Corpus and Respondent's non-ineffectiveness claims. (App. C.) In an Order dated October 30, 1996, the District Court denied the Supplemental Petition For Writ Of Habeas Corpus and Respondent's ineffectiveness of counsel claims on the ground that those claims were procedurally defaulted. (App. B.)

On appeal to the Ninth Circuit, the court granted relief on one of Respondent's trial claims (dual jury issue), but the court granted Petitioner's Motion For Rehearing En Banc and reversed that ruling. See, Lambright v. Stewart, 191 F.3d 1181 9th Cir. 1999). The court then remanded the case to the original panel for consideration of Respondent's remaining trial and sentencing claims. Id. In Smith v. Stewart, 241 F.3d 1191 (2001), the court granted relief on Respondent's claim of ineffective assistance of counsel at sentencing, holding that there was "no doubt" that Respondent had established a colorable claim on that issue, and that the state court had erred in denying Respondent's request for an evidentiary hearing on that issue. (App. A at A-11 to A-17.)[2] The court therefore ordered that the case be remanded

[2] The evidence of ineffective assistance relied upon by the Ninth Circuit was, *inter alia*, (i) counsel's failure to investigate, or present evidence of, Respondent's "miserable" childhood, mental disabilities and mental impairment at the time of the offense, (ii) his sole and inexplicable]" reliance on the immunity agreement obtained by the State's primary witness, and the "great loss" suffered by

to the District Court for an evidentiary hearing on the claim of ineffective assistance at sentencing. (Id. at A-17.)[3] In reaching the merits of Respondent's ineffectiveness at sentencing claim, the court held that the District Court had erred in finding that Respondent's claims were procedurally defaulted, because there was no independent state ground for the Arizona courts' denial of the claim. (Id. at A-7 to A-11.)[4]

Petitioner filed a timely Petition For Rehearing and Suggestion For Rehearing En Banc of the foregoing decision in Smith v. Stewart, and that Petition was denied by Order dated May 15, 2001. (App. D.) On August 13, 2001, Petitioner filed a timely Petition For Writ of Certiorari in this Court.

♦

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court to deny the Writ for the following reasons.

I

A

The Ninth Circuit Correctly Relied Upon the "Independent State Procedural Rule" Requirement Of Ake v. Oklahoma In The Habeas Proceedings In This Case.

Petitioner contends that the Ninth Circuit's reliance upon the "independent state procedural rule" requirement of Ake v. Oklahoma, 470 U.S. 68 (1985), to find that there was no procedural default of Respondent's claim was error, and conflicts with a decision of the Fourth Circuit which addressed the

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the victim's family, as reasons not to impose death, and (iii) his "rambling" explanation of his own moral opposition to the death penalty. (App. A at -4, 11-17.) The court described counsel's performance in the sentencing proceedings as "woefully inadequate". (Id. at 13.)

[3] The court denied relief on all of Respondent's other claims in a separate unpublished opinion. See Lambright v. Stewart, 2001 WL 228668.

[4] In light of its holding that there was no independent state ground for the denial of the claim, the court stated that there was no need to address Respondent's argument that the policy of the Pima County Public Defender preventing its attorneys from attacking the competency of any other attorney in the office was an "external" and "objective factor" constituting cause and prejudice for the procedural default. (Id. at A-7, A-8, n.3.) The court stated, however, that the argument "appears to have merit", citing Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000.) (Id.)

issue of whether Ake, a direct review case, applies in habeas proceedings under 28 U.S.C.§2254. (Pet. for Cert. at 7-15.) This contention is incorrect.

Petitioner's contention that Ake does not apply in habeas proceedings is based entirely on the following language in Coleman v. Thompson, 501 U.S. 722 (1991), concerning Ake:

> **Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if Ake applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.**

504 U.S. at 741. This language is dicta on the issue of whether Ake applies to habeas proceedings, as this Court effectively held that it did not have to decide that issue given the Virginia procedural rule's independence of federal law. An examination of this Court's habeas decisions shows that the "independent state procedural rule" requirement of Ake does apply in habeas.

In Wainwright v. Sykes , 433 U.S. 72 (1977), this Court held that the doctrine of "adequate and independent state ground" applies in habeas proceedings, and allowed a federal court to refuse to review a constitutional claim because the state court had declined to rule on the claim due to the petitioner's failure to comply with a state procedural rule, and the state court ruling was therefore not "independent" federal law. 433 U.S. at 81-87. This Court held that:

> **We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See, Henry v. Mississippi, 379 U.S. 433, 85 S.Ct. 5644, 13 L.Ed.2d 408 (1965).**

Id. at 86-87, emphasis added. This Court's reliance on Henry v. Mississippi, 379 U.S., 433 (1965), a direct review case, to hold in Sykes that the adequate and independent state ground doctrine applies in habeas cases, is an early indication that this Court intended the doctrine to have equal and coextensive application in direct review and habeas cases.

In County Court Of Ulster County, New York v. Allen, 442 U.S. 140 (1979), this Court relied upon Wainwright v. Sykes, supra, and recognized the existence of the adequate and independent state ground doctrine in habeas proceedings, but reached a different result than Sykes. This Court held that New York's contemporaneous objection rule was not an independent state ground for the denial of the

petitioner's claim because, unlike Sykes, it had not been shown that New York law required a contemporaneous objection to this type of instructional error, or that the state court had relied on any such state procedural rule in denying the claim. Id, at 147-154. In so applying the independent state ground doctrine, this Court stated that:

> **Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropriate respect to the sovereignty of the States in our federal system. Wainwright v. Sykes, 433 US, at 88, 53 L.Ed.2d 594 97 S.Ct. 2497. But if neither the state legislature nor the constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.**

Id. at 154, footnote omitted, emphasis added. In holding that the adequate and independent state ground doctrine applies throughout "our federal system", this Court again indicated that the doctrine applies equally and coextensively in direct review and habeas cases.

It was in Harris v. Reed, 489 U.S. 255 (1989), however, that this Court first specifically held that a direct review case relating to the independent state ground doctrine applied equally and coextensively to a habeas case. In Harris, this Court held that the "plain statement" rule established in Michigan v. Long, 463 U.S. 1032 (1983), and Caldwell v. Mississippi, 472 U.S. 320 (1985), both direct review cases, applied equally to habeas cases. 489 U.S. at 257-266. In Long, this Court held that when it is presented with a federal constitutional issue on direct review, it will find jurisdiction to review the claim:

> **in the absence of a plain statement that the decision below rested on an adequate and independent state ground.**

463 U.S. at 1043. This Court also held that when faced with an ambiguous state court decision, it will presume that no adequate and independent state ground was relied on, and will review the federal claim. Id. at 1042.[5] In Caldwell v. Mississippi, supra, this Court held, relying on Long, that in determining

[5] This Court summarized the plain statement rule in Long as follows:

> **In determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground**

whether jurisdiction exists on direct review:

> **[...W]e will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 US 1032, 1040-1041[.] "If the state court decision clearly and expressly indicates that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041[.]**

472 U.S. at 327.

In applying "plain statement" rule and presumption of no independent state ground of Long and Caldwell to habeas cases, Harris establishes that decisions of this Court relating to the adequate and independent state ground doctrine apply equally and coextensively to habeas cases. As stated in Harris:

> **Although Long and Caldwell arose on direct review, the principles underlying those decisions are not limited to direct review. Indeed, our opinion in Caldwell relied heavily upon our earlier application of the adequate and independent state ground doctrine to habeas review in Ulster County. See Caldwell, 472 US, at 327-328, 86 L Ed 2d 231, 105 S Ct 2633. Caldwell thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the Long "plain statement" rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Caldwell, 472 US, at 327, 86 L Ed 2d 231, US, at 1041, 77 L Ed 2d 1201, 103 S Ct 3469.**

489 U.S. at 263, footnote omitted.

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court reaffirmed its decisions in Sykes, Ulster County and Harris, supra, and held that the adequate and independent state ground doctrine applies in habeas cases, as well as direct review cases. 501 U.S. at 729-730. In so holding, this Court discussed the question of whether the doctrine applied differently in habeas cases than it does in direct review cases. Id. at 730. This Court observed that one difference between direct review and habeas cases is that in the former case it is reviewing whether the judgment of the state court violated federal law, while in the latter

> **and when it fairly appears that the state court rested its decision primarily on federal law.**
>
> Id., citation omitted.

case the federal courts are reviewing whether the custody of the defendant violated federal law. Id. This Court further observed, however, that:

> **Nonetheless, a state prisoner is in custody pursuant to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.**

Id., emphasis in original, citation omitted. Based on this reasoning, this Court stated that Harris had correctly held that the "plain statement" rule and presumption of Long and Caldwell applied to habeas cases. Id. at 730-735. Moreover, this Court emphasized that the rule was to be applied equally and coextensively in all such cases:

> **It is unmistakably clear that Harris applies the same presumption in habeas that Long and Caldwell adopted in direct review cases in this Court. See Harris, 489 U.S., at 263, 109 S.Ct. ("Faced with a common problem we adopt a common solution"); see also id., at 264, 103 L Ed 2d 308, 109 S Ct 1038 ("Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review"). Indeed, the quoted passage purports to state the rule "on either direct or habeas review." Harris, being a federal habeas case, could not change the rule for direct review; the reference to both direct and habeas review makes plain that Harris applies precisely the same rule as Long.**

Id. at 736. Finally, however, the Court held that the presumption of "no independent state ground" did not apply in Coleman's case because it did not "fairly appear" from the state court decision that it rested primarily on federal law, or was interwoven with federal law. Id. at 735-740.[6] This Court thus held Coleman's claim to be procedurally defaulted and that Coleman had failed to show cause and prejudice for that default. Id. at 740-757.

The above decisions of this Court show that the adequate and independent state ground doctrine applies equally and coextensively in direct review and habeas cases, and that decisions in one area are fully applicable and relevant to the other area.[7] It must be concluded, therefore, that Ake v. Oklahoma,

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[6] Coleman failed to file a timely notice of appeal from his murder conviction and death sentence, and that was the sole basis for the state court's ruling denying Coleman's petition for appeal. Id. at 726-728.

[7] See e.g., Harris, supra, 489 U.S. at 257-266 and Coleman, supra, 501 U.S. at 737-740 (adopting and applying Long and Caldwell to habeas, Caldwell,

a direct review case concerning the independent state ground doctrine, is fully applicable and relevant to habeas cases, and that the Ninth Circuit therefore correctly relied upon and applied Ake to this case.

Consistently with the cases of this Court discussed above which hold that a state court's ruling on a constitutional claim must be independent of federal law to be an independent state ground, Ake holds that the state procedural rule relied upon by the state court in denying the claim must also be independent of federal law. Ake, supra, 470 U.S. at 74-75. Ake had contended in his capital sentencing proceedings that as an indigent he was entitled under the Due Process Clause to the expert assistance of a psychiatrist to counter the expert testimony of the State's psychiatrist that Ake was likely to be dangerous in the future. Id. at 70-74. The State heavily relied on that testimony to argue that Ake be sentenced to death, and the trial court imposed death. Id. at 73-74. On appeal, the court held that there was no constitutional error, and also held that the claim was waived on appeal under Oklahoma law because Ake had not repeated his request for an expert in his motion for new trial. Id. On direct review by this Court, the State argued that the Court of Appeals' finding of waiver was an independent state ground for the state court's decision. Id. at 74-75. This Court rejected that argument, however, because the state's waiver rule had an exception under Oklahoma case law for claims of "fundamental trial error," which included federal constitutional error. Id. This Court held that since Oklahoma's procedural rule required the state court to determine whether a federal constitutional error had occurred before it could apply the rule, it was not independent of federal law, and could not be used to establish an independent state ground for the denial of Ake's claim. Id. Accordingly, this Court held that Ake's claim was not subject to procedural default, and heard the merits of his claim and ruled in his favor. Id. at 74-87.

Ake is an essential component of the independent state ground doctrine. Without examination and consideration of the procedural rule that a state court relied upon in denying a federal claim, it is impossible to accurately determine whether the state's ruling on the federal claim was truly independent of federal law. This point is illustrated by Ake itself. This Court recognized that on its face, the state

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supra, 472 U.S. at 327 (relying on Ulster County); Sykes, supra, 433 U.S. at 86-87 (relying on Henry v. Mississippi); see also Victor v. Nebraska, 511 U.S. 1, 18-19 (1994) (relying on Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991)).

court's ruling that Ake's federal claim was waived under Oklahoma law was an independent state ground for denying the claim as it was a "state-law ruling." 470 U.S. at 74. However, when this Court examined the Oklahoma procedural rule applicable to Ake, it was able to determine that the state court's ruling was not, and could not be, independent of federal law, because:

> **[B]efore applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.**

470 U.S. at 75, emphasis added. Thus, this Court held that "[d]espite the court's state-law ruling", id. at 74, emphasis added, the ruling was not an independent state ground because the state court was required to decide a federal question to determine whether the procedural rule applied to Ake's claim. The essential holding of Ake was, therefore, that since the Oklahoma procedural rule in question was not independent of federal law, any ruling by the state court based on that rule could never be independent of federal law, and could not constitute an independent state ground.

Based upon the above decisions of this Court, a federal court must conduct a two-step analysis to determine if there is an independent state ground for a state court's decision denying a federal claim. First, the court must determine, as a threshold matter, whether the applicable state procedural rule is independent of federal law. Ake, supra. If it is not, then the analysis need go no further, as any state court decision based upon that rule could not be independent of federal law. Id. If the procedural rule is independent of federal law, however, then the court must complete the second step, and determine whether the state court's ruling is independent of federal law. Harris v. Reed, Michigan v. Long, Caldwell v. Mississippi, supra. If it is independent, then the independent state ground doctrine applies and the constitutional claim cannot be reviewed by the federal court. If the ruling is not independent, however, then the federal court may review the claim. Id. Consideration of both the state rule under Ake, as well as the state ruling under Harris, is necessary to a fair and accurate determination of whether an independent state ground exists. Adoption of Petitioner's position that Ake should not apply in habeas proceedings would significantly undermine that doctrine, and weaken the authority and ability of the federal courts to review federal questions in habeas. This Court has clearly indicated in the cases discussed above that the independent state ground doctrine must be applied equally and coextensively in

direct review and habeas cases, and that Ake, should therefore have full application and relevance in a habeas case for purposes of the independent state ground doctrine. This Court recognized this in Harris v. Reed, supra, when it cited and referred to Ake "[f]or a discussion on whether a state procedural default ruling is 'independent'[.]" 489 U.S. at 260-261, n.6. In addition, in the habeas case of O'Dell v. Thompson, 502 U.S. 995 (1991), three Justices, including two present Justices of this Court, cited Ake in dissenting from a denial of a petition for writ of certiorari, stating that:

> **The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under Ake v. Oklahoma, the Virginia Supreme Court's rejection [of O'Dell's claim] may not be based on an independent state ground because Tharp v. Commonwealth requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.**

502 U.S. at 997-998, citation and footnote omitted. These statements further support the conclusion that Ake applies in habeas cases.

For all of the foregoing reasons, the requirement of Ake v. Oklahoma, that a state procedural rule be independent of federal law in order to constitute an independent state ground for denial of a constitutional claim, is fully applicable and relevant in habeas proceedings, and the Ninth Circuit properly and correctly relied on Ake in Respondent's habeas proceedings to find that the Arizona courts' denial of Respondent's ineffectiveness claim was not based upon an independent state ground.

B

There Is No Actual Conflict In The Circuits On The Issue Of Whether The "Independent State Procedural Rule" Requirement Of Ake Applies To Habeas.

Like the Ninth Circuit's decision in this case, the overwhelming number of Court of Appeals cases and District Court cases recognize that Ake applies to habeas cases as well as direct review cases.

The Second,[8] Eighth,[9] Ninth,[10] and Eleventh[11] Circuits have all cited and relied on Ake in habeas proceedings. In addition, District Court habeas cases from the Third Circuit have cited and relied on Ake.[12]

Petitioner contends, however, that the Fourth Circuit is in conflict with the Ninth Circuit's decision in this case applying Ake in habeas proceedings, and requests this Court to resolve the conflict. (Pet. for Cert. at 9-13.) Petitioner's contention is incorrect. The only Fourth Circuit case cited by Petitioner is O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). O'Dell involved the same Virginia notice of appeal rule at issue as in Coleman v. Thompson, supra, and the court stated that it agreed with the decision in Coleman that Ake "does not apply in the habeas context." O'Dell, 95 F.3d at 1244. It also held, however, as Coleman did, that the Virginia notice of appeal rule was independent of federal law, and that the petitioner's claim was therefore based on a independent state ground. Id. O'Dell does not support Petitioner's position for several reasons. First, it incorrectly concludes that this Court held in Coleman that Ake does not apply to habeas. As stated previously, the Court only stated in Coleman that it had not previously applied Ake in habeas proceedings, and that assuming arguendo that Ake did apply in habeas, the Virginia notice of appeal rule was in fact independent of federal law, thereby establishing an independent state ground. Coleman, supra, 501 U.S. at 741. Thus, Coleman's statement

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[8] Bradley v. Meachum, 918 F.2d 338, 343 (2nd Cir. 1990); Roy v. Coxon, 907 F.2d 385, 390-391 (2nd Cir. 1990).

[9] Malone v. Vasquez, 138 F.3d 711, 717-718 (8th Cir. 1998); see also Olesen v. Class, 962 F.Supp. 1556, 1570 (D.C.S.D.).

[10] Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000); Bargas v. Burns, 179 F.3d 1207, 1214 (9th Cir. 1999); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1991); see also, McLain v. Hill, 52 F.Supp.2d 1133, 1138-1139 (C.D.Cal. 1999); Karis v. Vasquez, 828 F.Supp. 1449, 1461, n.16 (E.D.Cal. 1993).

[11] Spivey v. Head, 207 F.3d 1263, 1283 (11th Cir. 2000); Card v. Dugger, 911 F.2d 1494, 1517 (11th Cir. 1990).

[12] Banks v. Horn, 49 F.Supp.2d 400, 405-406 (M.D.Pa. 1999); Johnson v. Ellingsworth, 783 F.Supp. 215, 219-220 (D.Del. 1992).

Respondent was unable to find any cases from the First or Fifth Circuits helpful on this issue.

about Ake was dicta, and not a holding binding on the Fourth Circuit. Second, the Fourth Circuit's own "holding" in O'Dell that Ake does not apply in habeas is itself dicta, because the court held, as Coleman did, that Virginia's notice of appeal rule was independent of federal law, and did not need to reach the Ake question. Third, and most importantly, however, O'Dell's statement that Ake does not apply to habeas has not been followed by the Fourth Circuit in any subsequent decision, and all Fourth Circuit cases following O'Dell have ignored it and recognized that Ake applies in habeas cases.[13] It can hardly be argued by Petitioner that O'Dell is in conflict with the Ninth Circuit when O'Dell is not even followed in its own Circuit. O'Dell, therefore, is an aberration, and the other Fourth Circuit decisions cited above show that the Circuit does not follow O'Dell and does apply Ake in habeas cases.

Finally, Petitioner also contends that the Ninth Circuit's decision in this case also conflicts with cases of the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 9-15.) This alleged conflict, however, is not based on whether Ake v. Oklahoma applies to habeas proceedings, and Petitioner concedes, as it must, that the Sixth, Seventh and Tenth Circuits, like the other Circuits mentioned previously, recognize the applicability of Ake to habeas cases. (Id. at 12.)[14] Petitioner contends, however, that these Circuits conflict with the Ninth Circuit's holding that a determination of whether a post-conviction claim in

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[13] Bacon v. Lee, 225 F.3d 470, 476 (4th Cir. 2000); Fisher v. Lee, 215 F.3d 438, 455 (4th Cir. 2000); Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000); Thomas v. Davis, 192 F.3d 445, 450 (4th Cir.1999); Yeatts v. Angelone 166 F.3d 255, 260 (4th Cir.1999); Fisher v. Angelone, 163 F.3d 835, 853 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 159 (4th Cir. 1998); Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998); Boyd v. French, 147 F.3d 319, 331 (4th Cir. 1998); Williams v. French, 147 F.3d 203, 208-209 (4th Cir.1998); Gilbert v. Moore, 134 F.3d 642, 656 (4th Cir. 1998); Mu'Min v. Pruett, 125 F.3d 192, 196 (4th Cir. 1997); see also, Oken v. Nuth, 64 F.Supp.2d 488, 494 (D.Md. 1999).

[14] See Scott v. Mitchell, 209 F.3d 854, 865-868 (6th Cir. 2000); White v. Schotten, 201 F.3d 743, 751-752 (6th Cir. 2000); Willis v. Aiken, 8 F.3d 556, 567 (7th Cir. 1993); (questioning applicability of Ake but still determining whether state rule was independent of federal law); Duvall v. Reynolds, 139 F.3d 768, 796-797 (10th Cir. 1998); Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1996); Steele v. Young, 11 F.3d 1518, 1521-1522 (10th Cir. 1993); Andrews v. Deland, 943 F.2d 1162, 1188, n.40 (10th Cir. 1991); Gutierrez v. Moriarty, 922 F.2d 1464, 1468-1469 (10th Cir. 1991); Shafer v. Stratton, 906 F.2d 506, 509 (10th Cir. 1990); Brasier v Douglas, 815 F.2d 64, 65 (10th Cir. 1987); see also United States ex rel. Campos v. Peters, 827 F.Supp. 1359, 1362 (N.D.Ill. 1993).

Arizona is of "sufficient constitutional magnitude" under Rule 32.2(a)(3) is independent of federal law under Ake. This issue is discussed in the next subsection.

For the above reasons, the Petitioner's contention that there is a conflict in the Circuits on the issue of whether Ake applies to habeas cases is incorrect. Only one Fourth Circuit case, O'Dell v. Netherland, supra, has held that Ake does not apply to habeas cases. As stated above, however, that case has not been followed in the Fourth Circuit, and it therefore cannot fairly be said that O'Dell is the law of the Fourth Circuit. Thus, there is no real conflict in the Circuit Courts of Appeals on this issue, and the Petition should not be granted on this basis.

C

The Ninth Circuit Correctly Held That A Determination Of Whether A Post-Conviction Claim Is Of "Sufficient Constitutional Magnitude" Is Not Independent Of Federal Law, And That Holding Does Not Conflict With the Sixth, Seventh And Tenth Circuits.

The Ninth Circuit held that to determine whether a post-conviction claim is precluded under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, the Arizona state courts must first determine whether the claim is of "sufficient constitutional magnitude". Smith, supra, 241 F.3d at 1196-1197. The court also held that this determination is not independent of federal law, and is therefore not an independent state ground under Ake v. Oklahoma. Id. Petitioner contends, however, that the Ninth Circuit's decision conflicts with cases from the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 11-15.) Petitioner's contention is incorrect.

The Sixth, Seventh and Tenth Circuit cases cited by Petitioner are all clearly distinguishable from this case because the state procedural rules at issue in those cases did not require a determination of federal law by the state court in order to apply the state procedural rule.

In Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), the court considered whether an Ohio procedural rule requiring a contemporaneous objection to jury instructions at trial was independent of federal law under Ake. The petitioner argued that the rule was not independent, because under Ohio law the appellate court could overlook the rule for claims involving "plain error", which could include

constitutional error. 209 F.3d at 865-868. The court rejected this argument, however, because under Ohio law "plain error" review is discretionary, and only applies in "exceptional circumstances". Id. Since the state court decision did not give any indication that the court had exercised its discretion to review for plain error, and appeared to have decided the issue solely based on the procedural rule, the court held that the state court decision was independent of federal law under Ake. Id. Relying on Coleman v. Thompson, supra, the court stated that:

> **The Supreme Court...does not find the mere reservation of discretion to review for plain error in exceptional circumstances to constitute an application of federal law.**

209 F.3d at 868. Unlike the Ohio rule at issue in Scott, supra, Arizona's Rule 32.2(a)(3) is neither discretionary nor limited to "exceptional circumstances". Rather, it requires an Arizona court to consider the merits of every post-conviction claim presented and determine whether the claim is of "sufficient constitutional magnitude". Smith, 241 F.3d an at 1196-1197 n.6. If the claim is of "sufficient constitutional magnitude", it must be heard on the merits unless the State can prove the claim was knowingly, intelligently and voluntarily waived. Id. If the claim is not of "sufficient constitutional magnitude", then the claim may be subject to waiver and preclusion, Id Like the "fundamental trial error" procedural rule in Ake, application of Rule 32.2(a)(3) depends upon an "antecedent ruling on federal law" and is not independent of federal law. Ake, supra, 470 U.S. at 75. Contrary to Petitioner's contention, therefore, Scott is not in conflict with the Ninth Circuit's decision in this case.

In Paprocki v. Foltz, 869 F.2d 281 (6th Cir. 1989), a case relied upon by the court in Scott v. Mitchell, supra, the court held that the petitioner's claim, that a self-defense instruction used in his trial was unconstitutional, was subject to procedural default as a result of his failure to object to the instruction at trial, as required by a Michigan procedural rule requiring contemporaneous objection. 869 F.2d at 284-285. The petitioner argued that the claim should not be defaulted, however, because the Michigan Court of Appeals, in denying the claim, reviewed the claim for "manifest injustice", and thereby addressed the merits of the claim and waived the procedural bar. Id. The court rejected this argument, however, holding that under Michigan law, the Court of Appeals' procedural rule on appeal for an unobjected-to claim:

was to enforce the procedural bar while reserving the right to excuse it if necessary to prevent manifest injustice.

869 F.2d at 285, emphasis added. The court held that:

> **[...w]e do not believe that the state court's explanation of why the jury instructions resulted in no manifest injustice can fairly be said to have constituted a waiver of the procedural default.**

Id. Like Scott, supra, the procedural rule at issue in Paprocki did not require the Michigan Court of Appeals to review the merits of the petitioner's claim. Since the error was not objected to, the court could, in its discretion, review the merits of the claim for "manifest injustice". As the court held in Scott, supra, relying on Coleman, supra, the mere reservation of discretion to review for manifest injustice is not a determination of federal law under Ake, 209 F.3d at 868. In this case, however, and as held by the Ninth Circuit, Arizona courts are required to review a post-conviction claim for its "constitutional magnitude" in order to determine whether the claim is precluded under Rule 32.2(a)(3). Thus, the Michigan procedural rule in Paprocki, supra, was independent of federal law under Ake, while Rule 32.2(a)(3) is not independent under Ake.

In Willis v. Aiken, 8 F.3d 556, 559-567 (7th Cir. 1993), the court held that the petitioner's claim that a jury instruction was unconstitutional was procedurally defaulted due to his failure to comply with an Indiana procedural rule requiring a contemporaneous objection at trial. Because there was no objection to the instruction, the Indiana appellate courts were permitted under Indiana law to review the claim only for "fundamental error." Id. at 560. On appeal, the court held that the instruction was not "fundamental error", citing only Indiana law. Id. The petitioner argued in federal habeas that the claim should not be held to be procedurally defaulted, because the state court's "fundamental error" review required a review for constitutional error, and that review was therefore not independent of federal law. The Seventh Circuit rejected this argument, however, because it found that Indiana law does not equate "fundamental error" with "federal constitutional error". Id. at 562-569. Rather, it found that Indiana law mandates review for "fundamental error" only when the denial of a fundamental right "gives rise to a question of fundamental error as defined by state law". Id. at 567, emphasis in original, quoting Gutierrez v. Moriarty, 922 F.2d 1464, 1469 (10th Cir. 1991). The court therefore concluded that the Indiana

appellate court's finding of "no fundamental error" was an independent state ground. Id. Thus, Willis is also distinguishable from this case, as the procedural rule at issue there was discretionary, and did not require a determination of federal law in order to apply the rule. As the Ninth Circuit held in this case, however, application of Rule 32.2(a)(3) requires a determination of the "constitutional magnitude" of a post-conviction claim, and is therefore not independent of federal law. .

Finally, in Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir. 1991), relied on in Willis v. Aiken, supra, the court held the petitioner's claim that he was entitled to an evidentiary hearing in federal district court on constitutional violations relating to preindictment and pretrial delay was procedurally defaulted due to the petitioner's failure to raise those issues in the state trial court. 922 F.2d at 1468-1472. The New Mexico Supreme Court had held on appeal that the petitioner failed to preserve the claims for appellate review by failing to both raise the issue and offer a "proper quantum of proof" in the trial court. Id. at 1468. In habeas proceedings, petitioner argued that New Mexico has an exception to its waiver rule for claims involving "fundamental error". Id. The petitioner argued that the New Mexico Supreme Court had in fact considered the merits of his claims under this exception, as it referred to "quantum of proof", a substantive issue, and had cited a New Mexico case in which the court had reviewed the merits of a defaulted claim. Id. Petitioner thus argued that New Mexico's "fundamental error" rule was analogous to the "fundamental trial error" rule in Ake v. Oklahoma, supra. Id. The Tenth Circuit rejected this argument, however, as it found from examining New Mexico case law that New Mexico "does not equate fundamental error with federal constitutional error." Id. at 1469. Instead, it found that under New Mexico law a ruling by a state appellate court simply denying a claim, as in petitioner's case, did not "necessarily" mean that the court found no federal constitutional error, and could also mean that the court (i) considered the merits of the claim and found no "fundamental error" as defined under state law, (ii) found a violation of a "fundamental right", which under New Mexico is a "federal constitutional right", but declined to exercise its discretion to review the claim on its merits or (iii) found the error to be "fundamental error" but harmless, and treat the claim as a "fundamental right" claim and subject it to waiver. Id. Thus, the court held that the denial of the claim did not necessarily require a

determination of the merits of a federal constitutional claim, and that New Mexico's procedural rules were, unlike the procedural rule in Ake, independent of federal law. Id. Thus the court held that the New Mexico procedural rule was an independent state ground for the decision and that petitioner's claim was procedurally defaulted. Id. Again, Gutierrez is distinguishable from this case because it involved a procedural rule which was discretionary and did not require a determination of federal law to apply the procedural rule.

For the above reasons, Petitioner's contention that the Sixth, Seventh and Tenth Circuits are in conflict with the Ninth Circuit on the application of Ake v. Oklahoma is incorrect. The Ninth Circuit correctly applied Ake in this case and held that Rule 32.2(a)(3) requires Arizona courts to determine the merits of a post-conviction claim to determine whether it is a claim of "sufficient constitutional magnitude" and whether it is precluded under that rule. Smith, supra, 241 F.3d at 1196-1197. The Ninth Circuit also correctly held that Rule 32.2(a)(3) is not independent of federal law under Ake because a ruling under Rule 32.2(a)(3) "necessarily includes an evaluation of the constitutional stature of the claim" and "does not rest on an independent state ground". Id. at 1196-1197, n.6. As stated above, the Sixth, Seventh and Tenth Circuit cases relied upon by Petitioner are completely distinguishable from this case and Ake, because the state procedural rules in those cases were discretionary in nature, and did not make:

> **'Application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed'.**

Smith. Id. at 1196, quoting Ake, 470 U.S. at 75.

For all of the above reasons, Respondent requests this Court to deny the writ as to Petitioner's first Question Presented For Review.

II

A

The Ninth Circuit Did Not Misinterpret Rule 32.2(a)(3) And Arizona Law In Finding That Application Of The Rule Requires A Determination Of the "Constitutional Magnitude" Of A Post-Conviction Claim.

The Ninth Circuit found, after an examination of Rule 32.2(a)(3), the Comment to that Rule, and case law relating to the Rule,[15] that an Arizona court is required to determine whether a post-conviction claim is of "sufficient constitutional magnitude" in order to determine whether the claim should be heard on the merits or precluded under Rule 32.2(a)(3). Smith v. Stewart, supra, 241 F.3d at 1196-1197. The court explained the Rule as follows:

> **The Arizona Supreme Court's 1992 comment to Rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant knowingly, voluntarily and intelligently waived the claim. Ariz.R.Crim.Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.**

Id. at 1197, n.6. The court thus held that under Rule 32.2(a)(3) claims of "sufficient constitutional magnitude" are an "exception" to preclusion under that Rule. Id. at 1197.

Petitioner contends, however, relying on State v. Espinosa, 29 P.3d 278 (App. 2001), that the Ninth Circuit's analysis of Rule 32.2(a)(3) is erroneous, that the Rule does not contain an exception for claims of "sufficient constitutional magnitude", and that the Rule does not require Arizona courts to determine the "constitutional magnitude" of a claim in order to apply Rule 32.2(a)(3). (Pet. for Cert. at 17-24.) Petitioner contends instead that Rule 32.2(a)(3) contains an exception, not for claims of "sufficient constitutional magnitude", but for a "narrow category of constitutional rights"[16], which are

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[15] See State v. Curtis, 912 P.2d 1341, 1344 (Ariz. App. 1995); State v. French, 7 P.3d 128, 130-131 (Ariz. App. 2000).

[16] Petitioner has placed the phrase "narrow category of constitutional rights" in quotation marks in the Petition, but has not cited what source or authority the phrase comes from. (Pet. for Cert. at 22.) If there is a source for this quoted phrase, Petitioner should provide it to Respondent, since Petitioner is relying on this phrase to support its position.

only those constitutional rights which require a defendant's "personal knowledge" to waive the right, and which the attorney may not waive for the defendant. (Id.) According to Petitioner, therefore, the only claims which are excepted from preclusion under Rule 32.2(a)(3) are those involving the right to counsel, the right to plead not guilty, the right to a trial by jury, and the right to be present at trial, all of which rights can only be waived by the defendant, and not the attorney. (Id.)

Petitioner's interpretation of Rule 32.2(a)(3) is incorrect, and is based entirely upon a misinterpretation of the following sentence in the Comment to the Rule; which Petitioner cites, emphasizes and relies on for its interpretation:

> **[...S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.**

(Pet. for Cert. at 21, emphasis in original). Based upon this sentence, Petitioner contends that:

> **Read in context, the reference in the Comment to claims of "sufficient constitutional magnitude" does not recognize or establish any general exception to Arizona's rules of preclusion. The Comment merely acknowledges that Arizona's rules of preclusion will not bar a claim involving a narrow category of rights absent an on-the-record personal waiver by the defendant.**

(Id. at 22, emphasis added.) This argument shows that Petitioner has misread the above sentence in the Comment. That sentence does not state, as Petitioner claims, that only constitutional rights requiring a personal waiver by the defendant are excepted from preclusion under Rule 32.2(a)(3). What the sentence actually states that a post-conviction claim which is not of "sufficient constitutional magnitude" may generally be waived by the defendant's counsel without the defendant's knowledge and personal waiver, unless a personal waiver is "specifically required" to waive that specific constitutional right. Petitioner has misread and misconstrued the Comment in contending that all claims except those involving constitutional rights requiring a personal waiver are precluded under Rule 32.2(a)(3). Moreover, Petitioner's construction of the Rule and Comment essentially renders the portion of the Comment referring to claims of "sufficient constitutional magnitude" meaningless and superfluous, and the Rule and Comment may not be interpreted in such a manner. The Ninth Circuit's analysis of Rule 32.2(a)(3) is reasonable and correct, and is supported by the Arizona case law relied upon by the court. See State

v. Curtis, supra, 912 P.2d at 1345 ("A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude" citing Comment). Moreover, even assuming, arguendo, that Petitioner's interpretation is correct, and that only claims involving constitutional rights for which a personal waiver is required are not precluded under Rule 32.2(a)(3), the Rule would still not be independent of federal law under Ake v. Oklahoma, supra. To determine whether a claim was subject to preclusion under Petitioner's interpretation of Rule 32.2(a)(3) an Arizona court would be required to make the following determinations before it could decide whether to hear the claim on the merits or preclude the claim under the rule: (i) whether the claim presented involved the violation of a federal constitutional right, (ii) whether the constitutional right was one which requires personal knowledge and waiver by a defendant and (iii) whether the defendant in fact previously made a personal waiver of the constitutional right. All of the above preliminary determinations would be necessary for an Arizona court to be able to apply preclusion under Rule 32.2(a)(3), and all of these determinations are "antecedent ruling[s] on federal law" on which the application of Rule 32.2(a)(3) depends. Ake, supra, 470 U.S. at 75. Thus, even under Petitioner's reading of Rule 32.2(a)(3) and its Comment, preclusion under Rule 32.2(a)(3) would not constitute an independent state ground for denial of a constitutional claim under that Rule. Ake, supra.

Finally, Petitioner's reliance on State v. Espinosa, supra, a decision of Division Two of the Arizona Court of Appeals, decided after the Ninth Circuit's ruling in this case, is misplaced because that decision conflicts with State v. French, supra, a prior decision of that court. In French, the defendant brought a post-conviction claim of ineffective assistance of counsel based upon his trial counsel's failure to request an alibi instruction. French, supra, 7 P.3d at 129-130. The State argued that the claim was precluded under Rule 32.2(a)(3) because the defendant failed to raise the claim in a previous Rule 32 Petition. Id. The defendant argued, however, based on the Comment to Rule 32.2(a)(3), that his claim was of "sufficient constitutional magnitude" to be heard on the merits and not precluded, and that he had not knowingly, intelligently and voluntarily waived the claim. Id. at 130. Relying on State v. Curtis, supra, a decision of Division One of the Arizona Court of Appeals, the court held that the ineffectiveness

claim was not of "sufficient constitutional magnitude" to avoid the preclusive effect of Rule 32.2(a)(3), and that the defendant had waived the claim by failing to raise it in his prior Rule 32 Petition. Id. at 130-131.[17] In so holding, the court examined the merits of the claim, and found, in essence, that any error was harmless due to the "ample evidence" supporting the conviction. 7 P.3d at 131.[18] Based on its review of the merits of the claim, therefore, the court held that trial counsel's failure to request an alibi instruction was not "so egregious" that it could not be precluded under Rule 32.2(a)(3). Id. at 130.

Thus, State v. French and State v. Curtis both clearly support the Ninth Circuit's conclusion in this case that under Rule 32.2(a)(3), a trial court must examine a post-conviction claim on its merits to determine if it is of "sufficient constitutional magnitude" that it cannot be precluded under that Rule. Inexplicably, however, just over a year after Division Two decided State v. French, it decided State v. Espinosa, supra, which appears to hold that the determination of whether a claim is of "sufficient constitutional magnitude" under the Comment to Rule 32.2(a)(3) is based upon whether the constitutional

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[17] In State v. Curtis, supra, the court held that the defendant's post-conviction claim that an alibi instruction was unconstitutional was not of sufficient constitutional magnitude", within the meaning of that term in the Comment to Rule 32.2(a)(3), and was therefore precluded under that Rule due to his failure to raise it in his appeal and prior Rule 32 Petition. Curtis, 912 P.2d at 1344-1345. The court held that:

> **A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the "asserted claim is of sufficient constitutional magnitude." Comment to Rule 32.2(a)(3)(Supp. 1994). We need not examine whether the standard alibi instruction could be better worded. At the time of the first appeal, the court not only reviewed the issues petitioner had raised, but also reviewed for fundamental error and found none. This review necessarily extended to the jury instructions. Petitioner's belated focus on the alibi instruction lacks sufficient constitutional magnitude to review an issue that he had two full opportunities to raise before. The trial court properly found this issue precluded by Rule 32.2(a)(3).**

Id. at 1344.

[18] The court relied on the victim's identification of the defendant, and a witness who saw part of the attack on the victim and provided a description of the car and license plate number of the car driven by the perpetrator which matched the defendant's car. 7 P.3d at 131.

right on which the claim is based is a right which must be "personally and expressly waived" by a defendant in order for waiver to occur. Espinosa, 29 P.3d at 280. The court stated that such rights would include the right to a jury trial and right to counsel. Id. Based upon this standard, the court held that the defendant's post-conviction claim that a plea agreement was unconstitutionally withdrawn by the State was not of "sufficient constitutional magnitude" to avoid preclusion because it was not:

> **such "'an inherently personal right of fundamental importance'" that it must be personally and expressly waived.**

Id. citing State v. Smith, 4 P.3d 388, 393 (Ariz. App. 1999) quoting Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973).

Contrary to Petitioner's contention, State v. Espinosa is not a valid basis for questioning the decision of the Ninth Circuit in this case. First, and for the reasons stated previously, Espinosa's reading of Rule 32.2(a)(3) and its Comment is unreasonable and incorrect, as there is nothing in either Rule 32.2(a)(3) or its Comment which supports its conclusion that the standard for preclusion under Rule 32.2(a)(3) is whether a constitutional right can be personally waived. Second, Espinosa does not even mention, much less follow, State v. Curtis, and State v. French, supra, the latter of which was a case from its own Division, and relies on cases which have nothing to do with preclusion. A decision concerning a state procedural rule which disregards and ignores prior relevant and applicable case law concerning the rule cannot be used as a basis for a procedural default, as procedural default can only be justified when the State court correctly follows an established state procedural rule which is consistently and regularly applied and enforced. Rule 32.2(a)(3), as unreasonably and incorrectly interpreted by State v. Espinosa, is not the procedural rule applicable to this case. Rule 32.2(a)(3), as explained in its Comment, State v. Curtis and State v. French, is the applicable state procedural rule here, and the Ninth Circuit correctly based its decision on that Rule. State v. Espinosa did not establish a procedural rule. It simply failed to follow the procedural rule existing at the time of the decision, and therefore cannot be the basis for a procedural default. Finally, and as stated previously, even if Espinosa were the standard for preclusion under Rule 32.2(a)(3), that would not change the result in this case, as an Arizona court would still be required to make an "antecedent ruling on federal law" in order to apply Rule 32.2(a)(3),

32.2(a)(3), and that Rule would therefore still not constitute an independent state ground under Ake. For all of the above reasons, Petitioner's contention that State v. Espinosa is applicable to this issue is incorrect.

B

The Ninth Circuit Correctly Held That The Arizona Courts Did Not Clearly And Explicitly Rely On A Procedural Bar In Denying Respondent's Ineffectiveness Claim, And That There Was Therefore No Independent State Ground For Denial Of The Claim

In addition to holding that Rule 32.2(a)(3) itself was not an "independent state procedural rule" under Ake, and therefore not an independent state ground for the denial of Respondent's ineffectiveness claim, the Ninth Circuit alternatively held that the Arizona trial court's ruling on the claim was not an independent state ground, because in that ruling the court did not "clearly and expl...tly" rely on a state procedural rule in denying the claim. Smith, supra, 241 F.3d at 1197. Petitioner contends, however, that the Arizona trial court clearly relied on a procedural bar in its ruling denying the claim, and that the Ninth Circuit erred in holding therefore that the ruling was not an independent state ground for the denial of Respondent's claim. (Pet. for Cert. at 15-16.) Petitioner's contention is incorrect for two reasons.

First, it is not necessary to determine whether the Arizona court relied on a procedural bar in its ruling. As stated previously, if a state procedural rule is not independent of federal law, then a court's ruling based on that Rule can never be independent of federal law assuming that the state court follows the rule, which it must. It was for this reason that this Court held in Ake v. Oklahoma that there was no independent state ground for the Oklahoma court's denial of Ake's claim, "[d]espite the court's state-law ruling", because under the rule the "state court must rule, explicitly or implicitly, on the merits of the constitutional question." Ake, supra, 470 U.S. at 74-75, emphasis added. Thus, since Rule 32.2(a)(3) is not independent of federal law, and since we must assume that the Arizona courts followed that Rule in this case, the trial court's ruling denying Respondent's ineffectiveness claim could never be an independent state ground. Based on Ake it is therefore unnecessary to determine whether the court relied on a procedural bar in its ruling denying the claim.

Second, the Order does not contain an independent state ground under the principles of Coleman, Harris, Long, and Caldwell, supra. The Ninth Circuit correctly held that it was "unclear" from the trial court's last order denying Respondent's claim[19] whether the court was invoking a procedural bar. 243 F.3d at 1195-1197. The Order does not cite Rule 32.2(a)(3) or any of its provisions. (App. H.) Moreover, any procedural ruling is "interwoven " with federal law. Long, supra, 463 U.S. at 1040-1041. The text of the ruling rejects Respondent's argument that the attorneys of the Pima County Public Defender intentionally stayed on the case so that they would not have to allege that one of their attorneys was ineffective. (Appendix H.) Based on this premise, the court's ruling, in essence, was that if Respondent had a colorable claim of ineffectiveness his counsel would have withdrawn from the case so that he could raise it. (Id.) Thus, the gist of the ruling is that Respondent does not have a colorable claim of ineffective assistance of counsel. (Id.) The ruling is therefore really a ruling denying Respondent's constitutional claim on the merits. To the extent that any procedural aspects of the case are discussed in the ruling, they are thoroughly "interwoven" with the merits issue of whether Respondent received ineffective assistance of counsel. Long, supra. Since any procedural issue is interwoven with the substantive claim of ineffectiveness, the presumption of Long, Caldwell, Harris and Coleman applies, and it must be presumed that there is no independent state ground for the decision. Since the presumption of "no independent state ground" applies, then the "plain statement" rule applies and the court must find that the ruling is not an independent state ground in the absence of a "plain statement" in the text of the ruling clearly and ambiguously relying on an independent state procedural rule. As stated above, the ruling does not state that the claim is precluded, and does not cite Rule 32.2(a)(3) or any other preclusion or waiver rule. In the absence of a plain statement in the ruling clearly and ambiguously relying on a state procedural rule to deny relief, there is no independent state ground for the Arizona courts denial of Respondent's claim, and the Ninth Circuit correctly held that the claim was not

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[19] It is the last reasoned state court decision denying a claim which must be examined in order to determine whether the denial of a claim was based on an independent state ground. Ylst v. Nunnemaker, supra, 501 U.S. at 802-803. Petitioner erroneously focuses on the trial court's first order denying the claim in contending that the trial court relied on a procedural bar.

procedurally defaulted. Id. Petitioner's contention that the Ninth Circuit erred in finding that the state court's ruling on the ineffectiveness claim did not procedurally bar this claim from habeas review is therefore incorrect. Id.

C

The Ninth Circuit Did Not Err In Refusing To Certify A Question Of Arizona Law To The Arizona Supreme Court.

Finally, Petitioner contends that the Ninth Circuit erred in refusing to certify a question of law to the Arizona Supreme Court concerning "any ambiguity or confusion over the meaning of Rule 32.2(a)(3)." (Pet. for Cert. at 25-27.) Petitioner's contention is incorrect. There may be some habeas cases where state law relevant to the case is so unclear or undefined that the certification of a state law question to the state court is necessary in order for constitutional claims to be decided. This case, however, is not one of those cases. The Ninth Circuit in this case examined Rule 32.2(a)(3), its Comment, and Arizona case law relevant to the rule and concluded that the Rule requires an Arizona court to determine whether the claim is of "sufficient constitutional magnitude" to be heard on the merits in post-conviction proceedings and not precluded under the Rule. This conclusion was reasonable and correct. Petitioner does not agree with this conclusion, however, and has reached the opposite conclusion i.e., that an Arizona court is not required to determine whether a claim is of "sufficient constitutional magnitude" in order to apply Rule 32.2(a)(3). Petitioner now requests that a certified question be presented to the Arizona Supreme Court concerning Rule 32.2(a)(3) and that the court's decision on the certified question become the law of this case. Respondent requests this Court to deny this request. Rule 32.2(a)(3) and the Comment to the Rule were issued by the Arizona Supreme Court and it was clear to the Ninth Circuit from the Rule and the Comment that the "constitutional magnitude" of a claim must be determined in order to apply Rule 32.2(a)(3). There is therefore no need for a certified question, as the Ninth Circuit, pursuant to its authority in habeas cases, had addressed the issue and reached a reasonable and correct conclusion concerning Rule 32.2(a)(3). Respondent therefore requests this Court to deny Petitioner's request to have a question certified to the Arizona Supreme Court on the meaning of Rule 32.2(a)(3)

III

Petitioner's Procedural Default Arguments In This Case Contradict The Claim It Is Making In Other Cases That It Has "Opted In" To Chapter 154 of the AEDPA, Which Contains A Statutory Default Rule Under Which Respondent Is Clearly Entitled To Review Of His Federal Constitutional Claims.

Prior to the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), the rule of procedural default in habeas corpus cases was "exclusively a matter of federal common law." Ortiz v. Stewart, 149 F.3d 923, 931 (9th Cir. 1998), cert. denied 526 U.S. 1123 (1999). See Wainwright v. Sykes, supra, 433 U.S. at 72, 100 n.2 (dissenting opinion of Justice Brennan).[20] "Chapter 154 of AEDPA codified a new default rule, applicable only to states that 'establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have ... become final for State law purposes.' 28 U.S.C. § 2261(b)". Ortiz, 149 F.3d at 931. The AEDPA default rule is set forth in 28 U.S.C. § 2264.

Respondent argued below through an Amicus Brief that the enactment of the AEDPA, and Petitioner's contention that it had "opted in" to AEDPA's Chapter 154, made Petitioner's arguments regarding common law procedural default inapplicable. Instead, Respondent argued, his entitlement to federal review should be measured by the standards of 28 U.S.C. § 2264. Ibid. Petitioner filed an Answering Brief opposing this argument. Under that section, Respondent is plainly entitled to federal review of his ineffective assistance claims, without regard to how, or even whether, those claims were raised in state court. That is because § 2264(a) allows federal review of claims never presented to state court, where "the failure to raise the claim is ... the result of State action in violation of the Constitution or laws of the United States ...." 28 U.S.C. § 2264(a) (emphasis added). Chapter 154 of the AEDPA itself is, of course, a "law of the United States," and one of its provisions is 28 U.S.C. §2261(d), which

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[20]From the time of its creation, it has been clear that the doctrine of procedural default is subject to amendment by Congress. See Wainwright v. Sykes, 433 U.S. 72, 100 n.2 (1977) (dissenting opinion of Justice Brennan).

provides:

> **No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.**

That provision, and §2261's other requirements for state post-conviction proceedings, were not followed in Respondent's case, as the same office that represented him at trial and an appeal represented him in state and federal post-conviction proceedings, and that resulted directly in the failure to challenge the effectiveness of trial counsel that is at issue here. Since Petitioner claims the benefits of Chapter 154, its failure to follow that provision in Respondent's case violated federal law. See Mississippi Protection and Advocacy System, Inc. v. Cotten, 929 F.2d 1054 (5th Cir. 1991)(where a state accepts federal benefits provided under specified conditions, state rules and regulations which violate those conditions are violative of federal law and invalid).

The Court of Appeals did not address this issue, presumably because it was bound by Circuit precedent holding that common law procedural default continued to apply in Arizona "[b]ecause Arizona ha[d] not finalized its procedures with respect to the appointment and compensation of counsel in post-conviction relief proceedings" and therefore was "not governed by Chapter 154." Ortiz v. Stewart, 149 F.3d at 931. However, on September 24, 2001, Petitioner prevailed in its argument to the Ninth Circuit that it has now "opted in" to Chapter 154. Spears v. Stewart, 2001 WL 111968 (9th Cir. filed September 24, 2001.)

That decision effectively moots the questions Petitioner is seeking to have reviewed in this case. At the least, if the decision in Spears stands, it means that any decision in this case will have little if any impact on future Arizona capital cases, which will be governed by §2264 rather than Sykes. In fact, Respondent would submit that it renders the common law default issues irrelevant in his case as well, because by its terms Chapter 154 applies to all cases involving capital sentences from a given state, or none: its applicability turns on whether "a State [has] establishe[d] by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for [providing] .... competent counsel

in State post-conviction proceedings" which is available "to all State prisoners under capital sentence ...." 28 U.S.C. § 2261(b) and (c) (emphasis added). A "mechanism" cannot be created, or function, only in a given case.

Nor can a State litigant properly make arguments regarding the nature and application of its laws in one case, and contrary arguments in another. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990), cert. denied, 501 U.S. 1260 (1991). Arizona cannot have it both ways. It has long claimed to have the "mechanism" required by Chapter 154 in place, and to apply it to "all State prisoners under capital sentence." It has now prevailed on that claim in the Court of Appeals in Spears, supra, entitling it to "special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of post-conviction counsel in state proceedings." Lindh v. Murphy, 521 U.S. 320, 327 (1997). One of those rules is the default rule of 28 U.S.C. § 2261. Having invoked its benefits, Petitioner should be held to the terms of that rule, which make its arguments here moot and which separately entitle Petitioner to review of the merits of his federal constitutional claims.

CONCLUSION

For all of the foregoing reasons, Respondent requests this Court to deny the Writ.

RESPECTFULLY SUBMITTED this 26th day of September, 2001.

S. JONATHAN YOUNG
Attorney for Respondent

for ROBERT J. HIRSH
Attorney for Respondent

DATED: September 26, 2001

APPENDIX A

Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001)

APPENDIX A

[Filed March 6, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DOUGLAS SMITH Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 D.C. No. CV-87-234-TUC-RMB OPINION

Appeal from the United States District Court for the District of Arizona;
Richard M. Bilby, Chief Judge, Presiding. D.C. No. CV-87-234-TUC-RMB.

Argued and Submitted August 17, 2000 -- Pasadena, California

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, DAVID R. THOMPSON, Circuit Judges.

COUNSEL

S. Jonathan Young, Tucson, Arizona; John F. Palumbo, Law Offices Pima County Public Defender, Tucson, Arizona, for the petitioner-appellant.

Scott Bales, Solicitor General, Phoenix, Arizona, for the respondent-appellee.

FERGUSON, Circuit Judge:

Robert Douglas Smith ("Smith") appeals from the district court's dismissal of his habeas corpus petition on the ground of procedural default. He claims that his trial counsel failed to investigate his mental condition or to present adequate mitigating testimony during the sentencing phase of his trial, despite clear indications at the time of the presence of a mental disorder. We reverse the district court's ruling that federal habeas review is barred. Because Smith has made a colorable claim to relief, we order an evidentiary hearing in the district court.

I.

In March of 1982, Smith and accomplice Joe Leonard Lambright were convicted of sexual assault, kidnaping, and first-degree murder. [FN1] The principal witness against them at trial was another accomplice, Kathy Foreman ("Foreman"), who exchanged her testimony on the Government's behalf for freedom from prosecution.

> FN1. Because the facts of the offense are set forth in our en banc opinion, we do not repeat them here. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir.1999) (en banc).

After the guilt phase of Smith's trial, the prosecution sought the death penalty on the theory that the murder had been committed in an especially heinous, cruel, or depraved manner under Ariz.Rev.Stat. Ann. § 13–703(F)(6). The government called Smith's former cellmate to the stand who, in seeking to reduce his own sentence, had told a criminal investigator that Smith laughed while fully confessing to the crime. When the government next called the investigator to testify about the conversation, she confirmed that Smith had described the crime to his cell-mate in exceptional detail, showed no remorse, and snickered throughout. In addition to presenting testimonial evidence, the prosecution displayed photographs of how the crime scene looked at night and during the day so that the court could fully grasp the victim's terror before she died.

Smith's counsel took less than a day to present the mitigating evidence he had gathered in support of sparing his client's life. Despite obvious indications that his client suffered from a mental disorder, the lawyer neither obtained nor presented any evidence of his psychiatric history and continuing mental impairment. He also failed to collect or present records relating to Smith's horrific childhood. Instead, his evidence consisted entirely of the testimony of Smith's mother-in-law and two sisters. Each witness was brief. Each offered only a general characterization of Smith as a nice and generous person who, along with his sisters, had grown up in an unstable household.

In closing argument, Smith's lawyer offered the court some reasons not to impose the death penalty. He opened by saying, "[f]irst of all, the most mitigating factor in the case is the fact that Kathy Foreman wasn't prosecuted at all." He made passing reference to Smith's "abusive childhood." Apparently believing that evidence of Smith's mental disorder might constitute a justification for the death penalty, the lawyer asserted:

> I'm told today by Jim Meyers there is a report from the hospital in Houston, which I haven't seen yet.... The reports I have are that he has problems with depression. He is a person of average intelligence. I don't know, and I'm making the statements on the reports I have seen so far, I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated.

***1194** Next, he asked the court to consider the *victim's family's* "great loss" in deciding Smith's punishment. He returned again to the government's failure to prosecute Foreman, spoke abstractly of his personal opposition to the death penalty, and promptly closed by saying, "[f]inally, again, I question how the Court could agree with the government, which is asking for the death penalty for Robert Smith, when it was the same government agency that chose to let Kat Foreman go without any prosecution at all... I don't think that's justice."

The state trial judge sentenced Smith to death. He rejected the lawyer's argument that Foreman's treatment at the government's hands warranted a lesser sentence for Smith because he did not "believe that any of the ramifications of her grant of immunity have diminished the moral, legal or ethical culpability or responsibility of either Mr. Smith or Mr. Lambright by any degree whatsoever." He justified his decision to impose death by stressing that, "I have, in fact, searched the record, the file, the pre-sentence report, my trial notes and recollections for any and all other factors which might conceivably mitigate your culpability for offenses of kidnaping and sexual assault and found none."

II.

The same office that represented Smith at trial continued to represent him unsuccessfully on appeal and in post-conviction proceedings. On direct appeal, the Arizona Supreme Court affirmed both Smith's conviction and sentence. *See State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (Ariz.1983). Smith's counsel then filed a series of state and federal post-conviction petitions, none of which included an ineffective assistance of counsel claim, and all of which were denied.

After exhausting available state remedies, Smith's lawyer filed an amended federal petition for writ of habeas corpus. Soon after, District Judge Bilby received a letter from Smith himself, complaining that he had instructed his lawyer to raise a claim of ineffective assistance of counsel, but that his lawyer had failed to do so. In the letter, Smith wrote:

> My attorney says he can't rais[sic] or file the issue of enafective [sic] assistants [sic] of countsaling [sic] cause he is empoleed [sic] by the same office as the attorney that handeled [sic] my trial. I'm under the inpresstion [sic] from him that if all the issue [sic] is denied, that I could then get the courts to apoint [sic] me another attorney to file this issue for me, IS THIS TRUE? To my understandig [sic] from everyone I've ask [sic], wrote [sic] to tells [sic] me diffrant [sic] things. I've written Denise Young and ask [sic her about this, it took her a long time

> to respond cause she's so bissy [sic] and still did'nt [sic] answer my questions [sic]. Sorry to have to bother you with this but I feel this is a very inportant [sic] issue, Is'nt [sic] it also true that all issues has [sic] to be rased [sic] and filed at one time acording [sic] to the new apeals [sic] law passed a cuppall [sic] of year [sic] ago? I would like this court to know that I want this issue inclouded [sic] in my apeals [sic]. I would like take this to [sic] time to respectfuly [sic] ask this Honorable Court to apoint [sic] me a new FEDERAL ATTORNEY to work with my attorney Mr. John F. Palumbo at the PIMA COUNTY PUBLIC DEFENDERS OFFICE TUCSON AZ. if this is possible, if not, please apoint [sic] me new Federal Apeal [sic] ATTORNEYS. THANK YOU! very much for your concederation [sic], time and help with this matter.

Smith's counsel confirmed in an affidavit to the court that the claim had not been raised because his employer, a state agency, prohibited its lawyers from attacking each other's performance as a matter of policy.

In response to Smith's letter, the district court appointed a lawyer in private practice to litigate his claim of ineffective assistance of trial counsel. Smith then filed a state post-conviction petition alleging for the first time several instances of ineffective assistance at trial and sentencing, which the court dismissed as procedurally ***1195** barred. The federal district court also refused to adjudicate Smith's ineffective assistance of counsel claim on the ground that "the [state] trial court found the claims precluded as a matter of state law."

III.

[1] We review de novo a district court's decision to deny a petition for writ of habeas corpus. *See Mayfield v. Calderon*, 229 F.3d 895, 2000 WL 1514610, at * 4 (9th Cir. October 13, 2000).

IV.

Smith raised an ineffective assistance of counsel claim for the first time in his third state post-conviction petition. The state court dismissed the claim in October of 1995. Two months later, the state court revisited Smith's claim in an order denying his motion for reconsideration. In the order, the court wrote:

> Counsel's assertion on page 4, line 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed ... to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith" is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client in an appellate matter from ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.
>
> It is HEREBY ORDERED Defendant's Motion for Rehearing is denied.
>
> The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are

summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

[2][3][4] We must determine whether the state court judgment in Smith's case bars federal review of his Sixth Amendment claim. *See Coleman v. Thompson*, 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state court's procedural ruling will bar our review only if its basis is separate and distinct from the federal question. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *see also Coleman*, 501 U.S. at 729–30, 111 S.Ct. 2546. [FN2] The State contends that the Arizona court's procedural default ruling in this case constitutes an independent state ground that bars us from reviewing Smith's ineffectiveness claim. [FN3]

FN2. To bar our review, a state's procedural default rule must also be adequate, which means that it is "strictly or regularly" followed. See *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *see also Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). We have held that Arizona's procedural default rule is regularly followed in several cases. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir.1998); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.1997).

FN3. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Because we conclude that the state court's ruling did not rest on an independent state ground, we do not address Smith's argument that the policy preventing employees from attacking the competency of any of the agency's lawyers constitutes cause

because it was an "objective factor" that was "external" to the petitioner and that "cannot fairly be attributed to him." *Id.*, 501 U.S. at 753, 111 S.Ct. 2546. We note however, that his argument appears to have merit under our recent decision in *Manning v. Foster*, 224 F.3d 1129, 1134 (9th Cir.2000), where we held that "a conflict of interest, independent of a claim of ineffective assistance of counsel ... constitute[s] cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim."

***1196** In *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that when a state's procedural default rule depends on an assessment of a federal claim, federal review is not barred. The state court in that case explicitly held that Ake had waived his federal constitutional claim by omitting it from his motion or a new trial. *Id.* at 74, 105 S.Ct. 1087. That court had ruled in another state case, however, that the waiver rule did not apply in cases of fundamental trial error. *Id.* By creating such an exception, "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." The Supreme Court concluded that because "resolution of the state procedural law question depends on a federal constitutional ruling, the state- law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75, 105 S.Ct. 1087.

We have similarly held that federal habeas review is not barred when a state makes the application of its default rule depend on a consideration of federal law. *See, e.g., Park v. California*, 202 F.3d 1146 (9th Cir.2000), *cert. denied*, — U.S. —, 121 S.Ct. 277, 148 L.Ed.2d 202 (2000); *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir.1995); *Russell v. Rolfs*, 893 F.2d 1033, 1035–36 (9th Cir.1990). In *Park*, 202 F.3d at 1149, the state court refused to consider the petitioner's federal constitutional claim because he had failed to raise it on direct appeal. Despite the state court's explicit reliance on procedural default in its ruling, we held that Park's federal claim was cognizable in federal habeas corpus proceedings because the California

Supreme Court had held in another case that a petitioner could overcome the procedural bar if he could show a violation of "fundamental constitutional rights." Id. at 1152. As we explained, "in light of [the California Supreme Court's] acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the [procedural] bar to any federal constitutional claims raised in Park's state habeas petition." *Id.* at 1153.

We also held in *McKenna v. McDaniel*, 65 F.3d at 1489, that a state court judgment explicitly invoking Nevada's procedural default rule as the basis for dismissing a post-conviction petition did not preclude federal review because the state court had explained in another case that it enjoyed the discretion to address errors of "constitutional dimension." We concluded that the existence of a discretionary exception in cases of constitutional dimension rendered the court's state-law procedural ruling "necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision." *Id.* at 1489.

It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. ***1197** The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review.

Moreover, it is clear at the time of the state's procedural ruling, Arizona courts were required to consider the merits of a claim. Ariz. R.Crim. Pro. 32.2(a) generally bars a defendant from obtaining relief from his conviction on a ground that he waived at trial, on appeal, or in any previous collateral proceeding. [FN4] At the time of the state

court's procedural ruling, however, Arizona courts were required to examine the nature of a claim to determine whether the state's procedural default rule applied. *See State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341, 1344 (Ct.App.1995); *see also State v. French*, 198 Ariz. 119, 7 P.3d 128, 130 (Ct.App.2000). Under Arizona's procedural default rule, "[a] claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude." *Curtis*, 912 P.2d at 1344 (internal quotation marks omitted). [FN5] Thus, Rule 32.2's procedural default rule applies where a petitioner's "belated focus" on an alleged error "lacks sufficient constitutional magnitude to revive an issue." *Id.* at 1344. [FN6]

FN4. Since 1992, Rule 32.2 provides, in pertinent part:
a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

FN5. Arizona's exception for overcoming procedural default in cases of constitutional dimension or egregiousness remains in effect. *See French*, 7 P.3d at 131 (applying the procedural default rule to petitioner's ineffectiveness claim because "[n]one of these omissions constitutes ineffectiveness so egregious and of such constitutional dimensions that it may not be precluded")

FN6. The Arizona Supreme Court's 1992 comment to rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant

'knowingly, voluntarily and intelligently' waived the claim." Ariz. R.Crim. Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.

Given Arizona's exception for errors of "constitutional magnitude," the state court's finding of procedural default in Smith's case necessarily included an evaluation of the strength of his federal claim. Indeed, like the procedural rulings in *Ake*, *Park*, and *McKenna*, the state court's procedural ruling in this case was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude. Thus, federal review is not barred.

V.

[5][6] Smith contends that he is entitled to an evidentiary hearing to develop his ineffective assistance of counsel claim. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who ***1198** has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir.1994). [FN7] No court has given Smith an opportunity to develop a factual record on his Sixth Amendment claim.

FN7. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-9, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court held that petitioners must show cause and prejudice for failing to develop

the material facts relating to a claim of ineffective assistance of counsel in state court. In his third Rule 32 petition, Smith attempted to develop the theory that his counsel provided ineffective assistance at sentencing. The court refused, however, to appoint a psychological expert to assist Smith in developing his argument. Despite Smith's attempt to have the court "consider his allegations of ineffective assistance," the court dismissed the claims without a hearing. Under these circumstances, Smith has satisfied the cause prong of *Tamayo-Reyes*. *See Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir.1997). The prejudice prong of *Tamayo-Reyes* is "coextensive with the prejudice prong of *Strickland*." *Correll*, 137 F.3d at 1414. For the reasons set forth below, we find that Smith has made a colorable claim of prejudice, and is therefore entitled to an evidentiary hearing on this question.

[7][8] To establish that his counsel was ineffective at sentencing, Smith must satisfy the standard the Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, he must show that his counsel's performance was deficient; that is, that it was "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. 2052. In addition to demonstrating counsel's deficient performance, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

[9] "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999), *cert. denied*, 527 U.S.

1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). As the Supreme Court recently made clear, counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *See Williams*, 120 S.Ct. at 1513-15 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation); *see also Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied*, — U.S. —, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (No. 00-110); *Caro*, 165 F.3d at 1225; *Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir.1998), *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir.1998), *cert. denied*, 525 U.S. 996, 119 S.Ct. 465, 142 L.Ed.2d 418 (1998).

There can be no doubt that Smith has asserted a colorable claim to relief entitling him to an evidentiary hearing. Smith alleges that his lawyer failed to investigate, let alone present evidence of, his miserable childhood, mental disabilities, and mental impairment at the time of the offense. The thin transcript of Smith's sentencing hearing reveals that his lawyer offered only the brief testimony of three lay witnesses who gave merely a vague description of his personality and childhood. When the time came to argue to the court that Smith's life was worth sparing, his lawyer asserted that the best mitigating factor in the case was Foreman's immunity agreement. Inexplicably, he also suggested that the court consider "how ***1199** Sandra Owen's [the victim] family has sustained a great loss" in deciding whether Smith deserved to be put to death. The lawyer then offered a rambling explanation of his moral opposition to the death penalty and promptly returned to the State's failure to prosecute Foreman. This was a woefully inadequate presentation in support of saving Smith from a sentence of death.

If Smith's allegations are true, his counsel's failure to conduct any investigation is particularly egregious in light of indications at the time of trial of the presence of a mental disability. We have explained that, "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting

strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995); *see also Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir.1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"), *cert. denied*, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998). This appears to be the case here. In a report assessing Smith's competency to stand trial, for example, Dr. Martin Levy noted that he had been hospitalized in a psychiatric unit and opined that, "Mr. Smith does have a history of psychiatric difficulties. Those difficulties have been primarily depressive in nature and have involved suicide attempts." Another report examining Smith's competency described him as "significantly anxious and depressed" and recommended further psychiatric evaluation.

The presentence report similarly signaled that Smith might have a mental disability. It noted that, as a child, Smith suffered from polio, a disease which can cause brain damage, and later underwent psychiatric treatment at a youth community mental health agency. It described Smith's numerous attempts to run away from his family beginning at age nine and his history of impulsive behavior. The report also revealed that Smith had used broken glass to cut through his skin and slash his veins in just one of several attempts to end his life. On another occasion, he shot himself in the stomach. Eventually, Smith began to abuse drugs, including LSD, marijuana, cocaine, psilocybin, heroin, PCP, and amphetamines. In conclusion, the report urged the court that, "[m]ental health counseling should be made available in the prison setting, keeping in mind that the defendant seems to be a high suicide risk." Rather than pursue an investigation, Smith's lawyers allegedly failed to develop any of this evidence, and in fact failed to either present argument relating to it or connecting it to any of Arizona's enumerated mitigating factors. We have previously found that the failure to present any argument based on a presentence report remarkably similar to the one in this case constituted deficient performance. *Smith*, 140 F.3d at 1269.

Smith alleges that his counsel would have uncovered substantial mitigating evidence if he had conducted an investigation. Smith has an IQ of 71, which is in the range of mental retardation. In a report prepared just two years after trial, moreover, Dr. David Gurland wrote that, "[i]n reviewing the data with regards to Mr. Smith, it becomes obvious that this is a man who is a marginally functioning individual who has been ever since his childhood." He noted that Smith was raised in a broken home and suffered both psychological and physical abuse. In commenting on his withdrawal from school in the eighth grade, Dr. Gurland wrote that, "[i]t is hard to know just how he managed to stay in school as long as he did." Smith's low I.Q. makes him "more of a follower than a leader. He is also easily influenced by others whom he may feel like him or admire him or want to be with him." Dr. Gurland concluded that the "patient should not, under the law, be given the death penalty as I think there are enough mitigating circumstances to, at worst, give him a life sentence." In addition to presenting ***1200** evidence that he suffered from a mental disorder, Smith also recounted to the district court that four inmates in a county jail took turns gang raping him when he was just eighteen years old. Smith's lawyer presented none of this powerful and potentially life-saving evidence at sentencing.

[10] Apart from allegedly failing to conduct any investigation into Smith's social and mental history, it appears from the transcript that his lawyer also failed to research the law on capital sentencing. In Arizona, a psychological disorder is a specifically enumerated mitigating circumstance. Ariz.Rev.Stat. § 13-703(G)(1). But when a report hinting at a possible mental impairment surfaced, Smith's lawyer minimized his client's mental disability and told the court, "I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated." It appears from this assertion that Smith's lawyer not only failed to recognize that a mental impairment could be mitigating, but also argued against his client's interests under the mistaken belief that the presence of a mental disorder was an aggravating factor. A misapprehension of the law that leads a lawyer to argue against his client's interests during the sentencing phase of a capital trial constitutes an "inadequac[y] in

rudimentary trial preparation and presentation" that falls outside the range of competent assistance. *Bean*, 163 F.3d at 1080; *see also Huynh v. King*, 95 F.3d 1052 (1996); *Scarpa v. DuBois*, 38 F.3d 1 (1st Cir.1994); *Morris v. California*, 966 F.2d 448, 454–55 (9th Cir.1991); *Blackburn v. Foitz*, 828 F.2d 1177 (6th Cir.1987). In short, Smith has presented a colorable claim of counsel's deficient performance.

Smith has, moreover, made a "colorable claim" that his counsel's deficient performance prejudiced him. The Supreme Court recently held that an attorney's failure to conduct an investigation into a petitioner's abusive childhood, borderline mental retardation, and prison record satisfied *Strickland*'s prejudice prong. *See Williams*, 120 S.Ct. at 1515. This was because, as the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516; *see also Smith*, 189 F.3d at 1013 ("We previously have found Strickland's prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentence, despite the presence of aggravating factors."); *Correll*, 137 F.3d at 1413 ("[B]ecause trial counsel failed to represent any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice.") (quoting *Strickland*, 466 U.S. at 694-95, 104 S. Ct. 2052). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean* 163 F.3d at 1081; *see also Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir.1995). In this case, the prosecution argued that only one aggravating factor existed. In response, Smith's lawyer not only allegedly failed to investigate his horrific childhood, mental retardation and possible brain damage, but also failed to do basic legal research. Smith has not only presented abundant evidence of deficient performance, but also of prejudice. There can be no question that he has satisfied the standard for obtaining an evidentiary hearing.

VI.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand so that the district court can determine whether Smith's allegations that his attorney neither investigated his mental condition nor presented adequate mitigating psychiatric testimony during the sentencing phase are true and, if so, *1201 whether he was denied effective assistance of counsel.

Concurrently herewith we file a memorandum disposition in which we affirm the petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

Smith v. Lewis, Unpublished Order of District Court filed October 31, 1996 denying Supplemental Petition

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[Filed Oct. 31, 1996]
Clerk, U.S. District Court
District of Arizona
By SMS Deputy

ROBERT DOUGLAS SMITH,	)	No. CIV 87-234-TUC-RMB
Petitioner,	)	
vs.	)	ORDER
SAMUEL E. LEWIS, et al.,	)	
Respondents.	)	

Before the Court is Petitioner Robert Douglas Smith's Supplemental Habeas Claim and Request For Expert Witness Fees. At issue is whether Smith's ineffective assistance counsel claims are procedurally barred with no exception available. Respondents move to deny the relief sought. After a review of the pleadings and record, the Court concludes that the claims are procedurally defaulted with no cause and prejudice shown. No fundamental miscarriage of justice will occur by the dismissal of this Petition.

Procedural Background

Smith was represented at trial by Thomas Hippert, an assistant public defender. A new assistant public defender, Lawrence Fleischman, represented Smith during his 1982 direct appeal. The Arizona Supreme Court affirmed Smith's conviction and death sentence. *State v. Smith*, 138 Ariz. 79, 86-87, 673 P.2d 17, 24-25

(1983), *cert. denied*, 465 U.S. 1074 (1984). In 1984, Fleischman field an petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. One ineffective assistance of trial counsel claim was raised relating to Hippert's failure to object to the trial court's reliance on hearsay evidence in the presentence report. The trial court found the claim precluded under Rules 32.2(a)(2) and (a)(3), waived for lack of objection at the sentencing hearing and meritless for reasons detailed in its April 17, 1985 Minute Entry. The Arizona Supreme Court denied review without comment.

In 1989, assistant public defender, John Palumbo filed a second Rule 32 petition while simultaneously acting as Smith's attorney in his federal habeas petition. No claims of ineffective assistance of counsel were raised. All claims were found precluded. The Arizona Supreme Court again denied review without comment. The United States Supreme Court denied certiorari.

While briefing was being completed by Palumbo on Smith's federal habeas petition, the Court received a letter directly from Smith expressing his desire to raise an ineffective assistance of counsel claim. Because the Public Defender's Office had represented Smith at all stages of his litigation, the Court determined that this was an issue Arizona should address. Hence, the Court allowed Smith to pursue that claim in state court while simultaneously proceeding with the briefing of his other federal habeas claims before this Court. On September 5, 1996, the Court denied those claims but allowed Smith to supplement his petition with the ineffective assistance of counsel claims presented to the state courts.

The trial court dismissed Smith's third Rule 32 petition on October 24, 1995 and denied a motion for rehearing on December 20, 1995. The Arizona Supreme Court denied review without comment.

Discussion

First, Petitioner asserts his ineffective assistance of counsel claims are not procedurally barred because the state court ruled on the merits. The Court disagrees.

On October 24, 1995, the trial court ruled:

> This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.
>
> The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material issue of fact or law exists which would be served by any further proceedings. Therefore,
>
> IT IS ORDERED dismissing the petition.
>
> This order is based on the following findings:
>
> The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.
>
> The claims are so old they are (1) *precluded by failure to bring them previously, in accordance with Rule 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).*

Minute entry dated October 24, 1995 (emphasis added). It is clear that the trial court found the claims precluded as a matter of state law.

Smith subsequently filed a motion for rehearing. It is this second minute entry which Smith asserts the trial court ruled on the merits of his claims thereby preserving them for federal habeas review. In denying the motion for rehearing, the state court found "The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffectiveness of counsel, or considered it, thought counsel ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous." Minute Entry of December 20, 1995. This language does nothing more than track the language of the October 24, 1995 minute entry. The language in both minute entries does nothing more than elaborate, albeit colorfully, why it dismissed Smith's third Rule 32 "due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner." Minute Entry of October 24, 1995. Smith's ineffective assistance of counsel claims were dismissed expressly for failing to conform the to the requirements of Arizona procedure. Accordingly, Smith's ineffective assistance of counsel claims are procedurally barred.

The Court may address the merits of the procedurally defaulted claims if Smith can show cause for the procedural default and actual prejudice therefrom. *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.), *cert. denied*, 116 S.Ct. 980 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). To demonstrate cause, Smith must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A showing that the factual or legal basis for a claim was not reasonably available to counsel or some interference by officials making counsel's compliance with the state procedural rules impracticable would constitute cause. *Id.* Lacking cause and prejudice, the Court may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of "one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 864, 130 L.Ed.2d 808 (1995).

Smith contends that the following supports a finding of cause: (1) the Public Defender's failure or refusal to challenge the conduct of a member of its own staff; (2) the Public Defender's failure to investigate and present psychological evidence; and (3) the ineffectiveness of appellate counsel. The Court finds that these allegations do not establish cause. Because Hippert simply chose to pursue evidence that was readily available and did not present an available claim does not establish cause. *Carrier*, 477 U.S. at 486, 106 S.Ct. at 2644 (counsel's failure to recognize the factual or legal basis for a claim or failure to raise the claim despite recognizing it does not constitute cause). Similarly, attorney ignorance or inadvertence in failing to raise certain claims in his state appeal is not "cause". *Id.* at 488. Thus, the mere fact that Fleischman did not raise any ineffective assistance of counsel claims in the direct appeal is not cause. Moreover, in reviewing the merits of Smith's federal habeas petition, this Court found no constitutional error. *See* Amended Order of September 5, 1996. The Public Defender's Office would have had no basis to challenge the conduct of a member of its own staff who applied sound trial strategy or elected to pursue one claim over another.

The record also does not support a finding that Smith's execution would constitute a fundamental miscarriage of justice. To be actually innocent of the death penalty, Smith must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S.333, ___, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992). The fundamental miscarriage of justice exception applies to the sentencing phase of a capital trial to one who is "actually innocent" of the death penalty. *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). A valid claim under this exception, however, is extremely rare. *Schlup*, 513 U.S. at ___, 115 S.Ct. at 864.

Today, Smith requests expert witness fees to allow him to be examined by a psychologist in order to demonstrate that he is actually innocent of the death penalty. He hopes to prove that such an examination will establish a single significant mitigating factor justifying the imposition of a life sentence. This request for a favorable hindsight evaluation is speculative. But more importantly, additional

mitigating evidence is not available to prove actual innocence for the death sentence under this exception. The actual innocence requirement focuses on the elements of eligibility, such as the existence of at least one aggravating factor, "and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error." *Sawyer v. Whitley*, ___ U.S. at ___, 112 S.Ct. 2523. Thus, the Court agrees with Respondents that Smith offers nothing to rebut the presumption that he is eligible for Arizona's death penalty beyond a reasonable doubt and that the death sentence is appropriate in his case. *See State v. Smith*, 138 Ariz. 79, 86-86, 673 P.2d 17, 23-24 (1983).

Conclusion

IT IS ORDERED that Petitioner Robert Douglas Smith's Request for Expert Witness Fees is DENIED;

IT IS FURTHER ORDERED that Respondent's Motion to Deny Expert Witness Fees and to Dismiss all Supplemental Habeas Claims is GRANTED and Petitioner Robert Douglas Smith's Petition for Habeas Corpus is DENIED WITH PREJUDICE and hereby DISMISSED.

Dated this 30 day of October, 1996.

S/_____
Richard M. Bilby
Senior United States District Judge

Supreme Court, U.S.
FILED
OCT 10 200
ERK

(3)

No. 01-339

IN THE SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

ROBERT DOUGLAS SMITH,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF

JANET NAPOLITANO
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

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REASONS WHY THE WRIT SHOULD ISSUE

The Ninth Circuit has set aside a procedural bar to federal collateral review by erroneously concluding that Arizona trial and appellate court judges are required to address the merits of a claim before determining whether it is precluded under Arizona law. The Ninth Circuit's ruling that Smith's ineffective assistance of counsel claim (raised in state court for the first time in Smith's third post-conviction relief proceeding) is not procedurally barred flies in the face of principles of federalism and comity, and is not supported by case law or by logic. Moreover, the ruling applies *Ake v. Oklahoma*, 470 U.S. 68 (1985), in a way that conflicts with the approach followed in four other circuits.

The Ninth Circuit has in effect ruled that Rule 32 of Arizona's Rules of Criminal Procedure, precluding consideration of a claim "[t]hat has been waived at trial, on appeal, or in any previous collateral proceeding," is a nullity. The decision affects every Arizona criminal case (capital and non-capital) in which claims have been found to be precluded in a post-conviction proceeding. At a minimum, this Court should accept review to order that a question be certified to the Arizona Supreme Court to address any perceived lack of clarity in Arizona law regarding Arizona's rules of preclusion.

I

THE NINTH CIRCUIT'S RELIANCE ON THE "INDEPENDENT STATE GROUND" HOLDING IN *AKE V. OKLAHOMA* CREATES A CONFLICT WITH THE FOURTH, SIXTH, SEVENTH, AND TENTH CIRCUIT COURTS OF APPEAL.

Relying on language from this Court's decisions in *Wainwright v. Sykes*, 433 U.S. 72 (1977), *Harris v. Reed*, 489 U.S. 255 (1989), and *Coleman v. Thompson*, 501 U.S. 722 (1991), Smith posits that "[i]t must be concluded, therefore, that *Ake*, a direct review case concerning the independent state ground doctrine, is fully applicable and relevant to habeas cases, and that the Ninth Circuit therefore correctly relied upon and applied *Ake* to this case." However, in *Coleman*, this Court

expressly left unanswered the question whether *Ake* applies in federal habeas, suggesting that the answer is not so obvious. Furthermore, even assuming *Ake* applies on federal collateral review, the Ninth Circuit's application of *Ake* in this case conflicts with the approach followed by other circuit courts of appeal.

A. *The Ninth Circuit's ruling is a departure from this Court's directives regarding the deference to be accorded to state procedural default rulings on collateral review.*

Smith's suggestion that the instant case is a logical extension of *Wainwright*, *Harris*, and *Coleman* should be summarily rejected. In *Wainwright*, this Court ruled that the petitioner had procedurally defaulted his involuntary confession claim by failing to comply with Florida state law requiring that the confession be challenged at trial or not at all. This Court noted:

> [The petitioner's] approach is, to say the least, difficult to square with the language of the [Florida Rule Crim. Proc. 3.190(i)], which in unmistakable terms and with specified exceptions requires that the motion to suppress be raised before trial. Since all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and since their action in so doing is quite consistent with a line of Florida authorities interpreting the rule in question as requiring a contemporaneous objection, we accept the State's position on this point.

433 U.S. at 85–86.

In the instant case, the language of Rule 32.2 of the Arizona Rules of Criminal Procedure sets forth in unmistakable terms and with specified exceptions that a defendant is precluded from raising in a post-conviction proceeding any claim that has been waived at trial, on appeal, or in any previous collateral proceeding. In rejecting Smith's ineffective assistance claim, the state court relied on this procedural bar without mentioning the *Strickland* test or otherwise addressing the

merits of the ineffective assistance of counsel claim. As in *Wainwright*, this Court should find that the state procedural rule operates to bar federal review of the claim.

In *Harris*, this Court held that federal collateral review of a claim is not barred unless the underlying state court decision reflects a "plain statement" that the state court has relied on a procedural bar in rejecting the claim. 489 U.S. at 265. Here, that requirement was satisfied by virtue of the state court's rejection of Smith's claims raised in his third post-conviction relief proceeding because "they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b)." (Appendix C to Petition for Writ of Certiorari, at 2.)

Coleman is particularly unhelpful to Smith's position. This Court rejected Coleman's argument that the state court's dismissal order in his state court case was ambiguous because it was issued "[u]pon consideration" of all the filed papers, including briefing addressing the merits of Coleman's federal claims. 501 U.S. at 744. This Court expressly recognized "the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them." *Id.* at 750.

It is difficult to imagine a case more inconsistent with *Coleman* than the instant case, in which the Ninth Circuit, addressing an issue the court raised on its own, concluded that Arizona's procedural rules regarding preclusion in post-conviction proceedings do not mean what they say. Smith's own counsel did not proffer this argument in the district court or in the Ninth Circuit. Nor did counsel for the petitioner in *Stewart v. LaGrand*, 526 U.S. 115 (1999), which involved the same procedural rule as that at issue in the instant case. Nor did this Court in *LaGrand*. To suggest that the Ninth Circuit's ruling is a reasonable extension of *Coleman* is an "Olympic stretch." *See Sochor v. Florida*, 504 U.S. 527, 534 n.* (1992).

Finally, Smith's quotation of the following language from *Coleman* provides additional insight as to why the Ninth Circuit's approach in this case is improper: "Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review." *Coleman*, 501 U.S. at 736 (citing *Harris*, 489 U.S. at 264). Response at 8. As pointed out in the amicus brief filed by the Criminal Justice Legal Foundation, this Court refused to overlook a procedural bar on direct review in *Sochor*, notwithstanding Florida law requiring the state appellate court to review for "fundamental error" a claim that had been waived at trial but raised on direct appeal. This Court noted that, because Florida's review for fundamental error did not equate to a review for all types of federal constitutional error, this Court lacked jurisdiction to address the merits of the claim. 504 U.S. at 534 n. *.

In the present case, the review engaged in by the state courts before determining whether a claim is precluded is simply a categorization inquiry, to determine whether the claim involves an issue for which an on-the-record waiver by the defendant is required. But even assuming the review is more than a categorization inquiry, it is clear that it involves something less than the full review for all constitutional error at issue in *Ake*. If the Ninth Circuit's ruling is not reversed by this Court, Smith and other Arizona prisoners will be granted, on federal collateral review, relief to which they would not have been entitled on direct review under *Sochor*.

B. *The Ninth Circuit stands alone in its application of Ake to a case in which the state courts did not analyze the merits of the claim at issue.*

Smith disputes that the decision in the instant case conflicts with cases from other circuits, and he cites a number of cases (Response at 14–15) in which *Ake* has been applied in federal habeas. However, *none* of the cases cited involve a holding (by a circuit court other than the Ninth Circuit) in which the court applied *Ake* to overlook a state procedural bar where the state court engaged in something less than a complete on-the-merits review for federal constitutional error.

As noted above, the instant case does not involve a comprehensive merits review for all types of federal constitutional error. The Ninth Circuit's ruling in this case conflicts with every circuit court that has analyzed whether *Ake* applies to a type of review less comprehensive than that at issue in *Ake*.

II

ASSUMING *AKE* APPLIES IN FEDERAL HABEAS, THE NINTH CIRCUIT'S RULING UNREASONABLY EXTENDS *AKE* BY MISINTERPRETING ARIZONA LAW.

A. *The State Courts Clearly Relied On A Procedural Bar.*

In discussing the "clearly relied" prong, Smith argues that "if a state procedural rule is not independent of federal law, then a court's ruling based on that rule can never be independent of federal law assuming that the state court follows the rule, which it must." (Response at 25.) Smith's argument conflates the "clearly relied" requirement with the "independent state ground" requirement. That argument ignores the fact that the Ninth Circuit used the "clearly relied" requirement as a *separate* basis for overlooking the procedural bar apart from the "independent state ground" requirement.

As amicus counsel has pointed out, "[n]o rational person could compare the order in the present case with the one in *Coleman* and find this one to be the less clear of the two. To the extent they differ, the differences point the other way." Amicus Brief at 12. The Ninth Circuit's failure to mention, let alone distinguish, *Coleman* in discussing the clear reliance issue is inexcusable. The state courts clearly relied on a procedural bar in rejecting Smith's ineffective assistance of counsel claim in his third post-conviction proceeding.

. . . .

. . . .

B. *The Ninth Circuit Misinterpreted 1992 Changes to Rule 32, And Erred By Concluding That Arizona Courts Are Now Required To Review The Merits Of A Claim Before Finding It To Be Precluded.*

Smith argues that *State v. Espinosa*, 29 P.2d 278 (Ariz. App. 2001), in which the Arizona Court of Appeals interpreted the state courts' review of a precluded claim to be a categorization inquiry, should be ignored. To the contrary, *Espinosa* is directly on point, and should be given more weight than the dicta relied on by the Ninth Circuit from *State v. French*, 7 P.3d 128 (Ariz. App. 2000), and *State v. Curtis*, 912 P.2d 1341 (Ariz. App. 1995).

Smith does not dispute the history of Rule 32.2 provided by the State. Nor does he dispute that every previous federal court decision (including a decision from this Court) interpreting the 1992 amendment to Rule 32.2 has found that preclusion under Rule 32.2 results in a bar to federal collateral review. The Ninth Circuit's *sua sponte* decision to re-interpret the 1992 amendment to Rule 32.2 to do away with the procedural bar is unsupportable.

C. *The Ninth Circuit Erred By Refusing To Certify A Question To The Arizona Supreme Court To Clarify The Meaning Of Arizona Law.*

Smith's acknowledgment that *Espinosa* conflicts with the Ninth Circuit's ruling in this case suggests that, at a minimum, this Court should certify a question to the Arizona Supreme Court to clarify the alleged uncertainty in Arizona law regarding Arizona's rules of preclusion. Furthermore, one of the cases cited by Smith (Response at p. 13) provides additional support for that position. In *Spivey v. Head*, 207 F.3d 1263, 1283, n.20 (11th Cir. 2000), the Eleventh Circuit sidestepped the issue of whether Georgia procedural default law required the consideration of an antecedent question of federal constitutional law. The court noted that "Rather than attempt to resolve this *state law* issue, we assume *arguendo* that there is no procedural bar," and rejected the claim on the merits. 207 F.3d at 1283, fn. 20 (emphasis added).

The Eleventh Circuit's conclusion that the question is one of *state law* mirrors the deference accorded by this Court to the Virginia Supreme Court in *Coleman* when it "declii.e[d] Coleman's invitation to announce such a practice [relating to a Virginia procedural rule] for that court." 501 U.S. at 743–44.

Smith argues that because "it was clear to the Ninth Circuit from the Rule and the Comment that the "constitutional magnitude" of a claim must be determined in order to apply Rule 32.2(a)(3)," "[t]here is therefore no need for a certified question." Smith's argument is belied by the fact that his own attorneys apparently did not recognize the clarity of the rule, and by the fact that no other court (including this Court) interpreting the amended version of Rule 32.2 has recognized the theory advanced by the Ninth Circuit. At best, the Ninth Circuit's new theory relating to how Rule 32.2 should be interpreted establishes the need for a question to be certified to the Arizona Supreme Court regarding the meaning of Rule 32.2

III

WHETHER ARIZONA IS AN "OPT-IN" STATE IS IRRELEVANT IN THIS CASE.

Relying on Ninth Circuit's recent ruling in *Spears v. Stewart*, 2001 WL 111968 (9th Cir. 2001), that Arizona has now "opted in" to the accelerated federal review provisions set forth in Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Smith argues that the State is somehow foreclosed from raising any "contradictory" arguments relating to pre-AEDPA procedural default rules.

Smith's argument is nonsensical. This is not an opt-in case. The attorney appointed to represent Smith in his first (pre-1996) post-conviction proceeding was obviously not appointed under the "opt-in" provisions adopted by the State after 1996. The State has never argued, and never will argue, that this is an "opt-in" case. Nor will it ever argue that any other case in which post-conviction counsel was not appointed under the "opt-in" provisions is an "opt-in" case. There is nothing

contradictory about the arguments the State is advancing in this case and those advanced in the *Spears* litigation.

CONCLUSION

The Ninth Circuit's ruling that the procedural bar imposed by the state courts in rejecting Smith's ineffective assistance of counsel claim in his third state post-conviction proceeding conflicts with case law from this Court and from four federal circuits, and is premised on a misinterpretation of Arizona law. The ruling affects, not only this case, but *every* pending and future Arizona criminal case (capital and non-capital) in which claims have been found (or will be found) precluded in a post-conviction proceeding under Rule 32.2.

None of the case law or argument provided by Smith provides a basis for upholding the Ninth Circuit's ruling. Accordingly, and based on the foregoing authorities and argument, the State of Arizona requests that this Court grant the petition for writ of certiorari.

Respectfully submitted.

JANET NAPOLITANO
Attorney General

KENT E. CATTANI
Chief Counsel,
Capital Litigation Section
(Counsel of Record)

Attorneys for PETITIONERS

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No. 01-339

IN THE

Supreme Court of the United States

TERRY L. STEWART, Director,
Arizona Department of Corrections,

Petitioner,

vs.

ROBERT DOUGLAS SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Counsel of Record
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816

Phone: (916) 446-0345
Fax: (916) 446-1194
E-mail: cjlf@cjlf.org

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

2390

QUESTIONS PRESENTED

1. When a state makes an exception to its procedural default rule for a limited subset of constitutional claims, does the state court's determination that the claim does not fall within that category render the state rule "not independent of federal law" within the meaning of *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985)?

2. When a state court rules that a claim is "precluded" with an express reference to the pertinent state procedural default rule, does the state court's expression of doubt that the petitioner had a meritorious claim render the procedural basis of the ruling "unclear" so as to open the merits to federal habeas review?

IN THE

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TERRY L. STEWART, Director,
Arizona Department of Corrections,

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vs.

ROBERT DOUGLAS SMITH,

Respondent.

MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation[1] respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in this case. Counsel for petitioner has consented, but counsel for respondent has withheld consent.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Procedural default rules are necessary for efficient and timely resolution of an appellant's claims. The Ninth Circuit's refusal to respect these rules in the present case and cases from other states will needlessly delay enforcement of the death penalty, reducing its deterrent effect. These delays are contrary to the rights of victims and society which CJLF was formed to advance.

September, 2001

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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IN THE

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

Over 20 years ago, Robert Smith and an accomplice kidnapped, raped, and murdered Sandy Owen in Arizona. *State* v. *Lambright*, 138 Ariz. 63, 67, 673 P. 2d 1, 4-5 (1983), overruled on other grounds in *Hedlund* v. *Sheldon*, 173 Ariz. 143, 146, 840 P. 2d 1008, 1011 (1992). His conviction and death sentence were reviewed by the state courts on direct appeal and in two collateral reviews. See *State* v. *Smith*, 138 Ariz. 79, 673 P. 2d 17 (1983); App. to Pet. for Cert. B-2.

Ten years after the initial state collateral review, petitioner filed a third state collateral petition. See App. to Pet. for Cert. D-2. The trial court dismissed the petition, holding:

> "The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e),

> 32.1(f), or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b)." App. to Pet. for Cert. C-2.

The court also noted that it found "outrageous" petitioner's suggestion that attorneys in the Pima County Public Defender's office had failed to bring a valid ineffective assistance claim merely to avoid embarrassing a colleague. *Ibid.* Two months later, the court denied rehearing, repeating a similar observation about this allegation. The trial court further noted that the allegation that the public defender's attorneys do not raise allegations of each other's ineffectiveness was factually incorrect, as that office had done so in other cases. See *id.*, at D-1, D-2.

The Arizona Supreme Court denied review without comment. *Id.*, at E-1.

The federal District Court also denied the federal habeas petition, finding the claim precluded by the procedural default in state court. The Court of Appeals for the Ninth Circuit reversed on this ground. The court noted that Arizona makes an exception to procedural default for claims "of sufficient constitutional magnitude." *Smith* v. *Stewart*, 241 F. 3d 1191, 1197 (2001), quoting *State* v. *Curtis*, 185 Ariz. 112, 912 P. 2d 1341, 1344 (Ariz. App. 1990) (internal quotation marks omitted). The Court of Appeals believed that applying this exception "necessarily included an evaluation of the strength of [Smith's] federal claim," and that under Ninth Circuit precedent this rendered the rule not independent of federal law. See *id.*, at 1196-1197. In the middle of its "independent rule" discussion, the Court of Appeals also found it "unclear . . . whether the [state] court invoked a procedural bar as the basis for its ruling." *Id.*, at 1196. The court stated, apparently as an alternative basis for its decision, that the state court's order in the present case "does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review." *Id.*, at 1197.

SUMMARY OF ARGUMENT

The present case should be heard on the merits as a companion case to *Lee* v. *Kemna*, presently before the Court. *Lee* involves the "adequate" portion of the "adequate and independent state grounds" problem, and this case involves the "independent" portion. Deciding both cases will provide a more complete resolution of related issues in a complex area.

The Court of Appeals' decision on the independence of the state rule is squarely contrary to the decision of this Court in *Sochor* v. *Florida*. The position of the Court of Appeals is largely the same as the position taken by the *Sochor* dissent and rejected by the Court. However, because that rejection came only in a responsive footnote, it warrants a more complete exposition.

The Court of Appeals' alternative holding, that the basis of the state court's order in this case is somehow not sufficiently clear, amounts to defiance of the on-point precedent established by this Court's decision in *Coleman* v. *Thompson*. There do not appear to be any valid grounds for distinguishing *Coleman*, and the Court of Appeals made no effort to do so.

ARGUMENT

I. This case is a worthwhile companion to *Lee* v. *Kemna*, presently before the Court.

On occasion, this Court has substantially clarified a troublesome area of the law by taking two or more cases in the same term to address different aspects of a problem. *United States* v. *Cronic*, 466 U. S. 648 (1984) and *Strickland* v. *Washington*, 466 U. S. 668 (1984) together straightened out many previously unresolved issues on ineffective assistance claims. Similarly *Murray* v. *Carrier*, 477 U. S. 478 (1986) and *Smith* v. *Murray*, 477 U. S. 527 (1986) together resolved multiple questions regarding defaults on appeal.

The issue of "adequate and independent state grounds" qualifies as a troublesome area. Scholars have long been critical of the lack of coherence of the cases in this area. See, *e.g.*, 16B C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4023, p. 358 (2d ed. 1996) ("a confused picture").

Lee v. *Kemna*, No. 00-6933, presents a question regarding when a state procedural default rule is "adequate." *Lee* is an opportunity to replace the "varying rubrics" of inadequacy, as Hart and Wechsler call them, with a single, coherent standard. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Lee* v. *Kemna*, No. 00-6933, pp. 5-10 ("CJLF *Lee* Brief"). However, the picture would be more complete and the resolution more productive if the Court also addresses the question of when a state ground is "independent." Any such discussion in *Lee* would be *obiter dicta*, because that case does not involve an independence challenge to the state rule.

Independence and adequacy are separate concepts that ought to be analyzed separately, yet they are often confused. *McKenna* v. *McDaniel*, 65 F. 3d 1483, 1488-1489 (CA9 1995) held that Nevada's procedural default rule did not bar federal review because the state court had the discretion to waive it. Is that an "adequacy" problem, an "independence" problem, or simply erroneous? The Court of Appeals in the present case relied on *McKenna* for its holding that the state ground was not independent, *Smith* v. *Stewart*, 241 F. 3d 1191, 1196 (CA9 2001), but two days later a different panel of the same court held that this was an "adequacy" issue. See *Petrocelli* v. *Angelone*, 248 F. 3d 877, 886 (CA9 2001). *Amicus* believes the third option is correct. Discretion is a virtue, not a problem, and *McKenna* is simply wrongly decided. See Wright, Miller, & Cooper, *supra*, § 4026, at 385-386; CJLF *Lee* Brief 12-13. See also *Petrocelli*, *supra*, at 892 (Rymer, J., concurring) (noting the confused, conflicting state of Ninth Circuit law on this point).

Unfortunate and unnecessary language in *Sullivan* v. *Little Hunting Park, Inc.*, 396 U. S. 229 (1969) and other cases in the "adequacy" branch of this area of the law have created a perverse incentive toward rigidity. In *Lee*, *amicus* CJLF has invited the Court to prune this branch to accommodate the legitimate interests of both the states and the habeas petitioners. See CJLF *Lee* Brief 12-14. However, as the present case illustrates, expansive interpretation of the "independence" requirement threatens to create a similar problem. Rejecting a similar claim that "miscarriage of justice" review by the state court opened the door to plenary federal habeas, then-Judge Breyer wrote for the First Circuit:

> "If federal habeas courts were too ready to find that state 'miscarriage of justice' review constitutes 'waiver' of the state's procedural rules, the state either would have to convert what is often a speedy reviewing task into a full scale detailed examination of federal law *or it would have to abandon 'miscarriage of justice' review altogether. The latter alternative seems highly undesirable.* The former conflicts with the theory of *Wainwright* [v. *Sykes*, 433 U. S. 72 (1977)]." *McCown* v. *Callahan*, 726 F. 2d 1, 3-4 (1984) (emphasis added).

The present case, along with *Lee* v. *Kemna*, offers an opportunity to clear up the confusion, remove the perverse incentive, and establish a coherent rule which encourages states to provide relief from plain errors, fundamental errors, and miscarriages of justice, rather than discouraging such relief.

II. The decision in the present case conflicts with *Sochor* v. *Florida*.

The Court of Appeals held in the present case that "the state court's procedural ruling . . . was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude." *Smith* v. *Stewart*, 241 F. 3d 1191, 1196 (CA9 2001). From this premise, the Court of

Appeals concluded that "federal review is not barred." *Ibid.* This is essentially the same argument made by the dissent and rejected by the Court in *Sochor* v. *Florida*, 504 U. S. 527 (1992).

On direct appeal to the Florida Supreme Court, Sochor complained of error in the penalty phase jury instructions on the "heinousness factor." See *id.*, at 533. The state court rejected the claim as procedurally defaulted due to failure to object at trial and, in the alternative, without merit. See *id.*, at 534, quoting *Sochor* v. *State*, 580 So. 2d 595, 602-603, and n. 10 (Fla. 1991).

Ten years earlier, the state court had clarified the "fundamental error . . . exception to the contemporaneous objection rule as set out in Florida Rule of Criminal Procedure 3.390(d)." *Ray* v. *State*, 403 So. 2d 956, 960 (Fla. 1981). The court noted that "the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application." *Ibid.* The court specifically held that constitutional errors are not necessarily fundamental, and failure to object may waive any defects. *Id.*, at 961, citing *Wainwright* v. *Sykes*, 433 U. S. 72 (1977).

In *Sochor*, this Court granted certiorari to consider the merits of the "heinousness" jury instruction claim, among other issues. 504 U. S., at 532. However, on full consideration, the Court held that the procedural default ruling was an adequate and independent state ground and hence a jurisdictional bar. *Id.*, at 534, 535, n. *. The dissent argued that federal review was not barred because the Florida Supreme Court had the power to reach the merits through fundamental error review. See *id.*, at 548 (Stevens, J., dissenting), citing *Ray* v. *State*, *supra*. In particular, the dissent argued that the procedural default ruling required a review of the merits in order to determine whether the fundamental error exception applied. See *id.*, at 548, n. 7.

The Court of Appeals decision in the present case is based on a similar but even more cramped interpretation of the independence requirements. The Court of Appeals believed that *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985) negates the independence of the state rule any time that rule "depends on an *assessment* of a federal claim," *Smith*, 241 F. 3d, at 1196 (emphasis added), or even if the state "courts were required to *examine the nature* of a claim to determine whether the state's procedural default rule applied." *Id.*, at 1197 (emphasis added).

The *Sochor* Court rejected this narrow view of what constitutes an independent state ground.

> "Third, Justice Stevens suggests that, in holding Sochor's claim waived, the Supreme Court of Florida implied that the claim did not implicate 'fundamental error,' and that this in turn implied a rejection of Sochor's claim of 'error' presumably because all federal constitutional error (or at least the kind claimed by Sochor) would automatically be 'fundamental.' *Post*, at 548-549. To say that this is 'the most reasonable explanation,' *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), of the court's summary statement that Sochor's claim was 'not preserved for appeal,' see 580 So. 2d, at 602-603, is an Olympic stretch, see *Harris* v. *Reed*, 489 U. S. 255, 274-276 (1989) (Kennedy, J., dissenting). In any event, we know of no Florida authority supporting Justice Stevens's suggestion that all federal constitutional error (or even the kind claimed by Sochor) would be automatically 'fundamental.' Indeed, where, as here, valid aggravating factors would remain, instructional error involving another factor is not 'fundamental.' See *Occhicone* v. *State*, 570 So. 2d 902, 906 (Fla. 1990), cert. denied, 500 U. S. 938 (1991)." *Sochor*, 504 U. S., at 535, n. *.

A review for fundamental error, says *Sochor*, is equivalent to merits review only if all constitutional errors, or at least all of the kind in question, are automatically fundamental, as they were in *Ake* v. *Oklahoma*, *supra*, at 75. A state may legiti-

mately define a subset of constitutional claims as "fundamental" and thus undefaultable, and the definition of that subset is a matter of state law. State courts must, of course, follow this Court's precedents regarding which claims can only be knowingly waived, not inadvertently forfeited, as a matter of federal constitutional law. See *Freytag* v. *Commissioner*, 501 U. S. 868, 894-895, n. 2 (1991) (Scalia, J., concurring in part and concurring in the judgment) (collecting cases). A state court determination on that basis would be reviewed under 28 U. S. C. § 2254(d)(1). We are concerned here only with the state's voluntary decision to expand undefaultable status to claims outside the federal constitutional minimum. The state-law nature of the inquiry is confirmed by *Sochor*'s citation of a state case for the proposition that the error claimed is not "fundamental."

In a footnote responding to the passage quoted above, Justice Stevens protested, "The Court clearly misconstrues my point about fundamental error . . . ." *Sochor*, 504 U. S., at 548, n. 8. Even so, the passage reflects the Court's understanding of what the dissent would *need* to have argued to establish that Florida's "fundamental error" exception was a "merits" determination sufficient to open the door to federal review. The dissent asserted, correctly, that the Florida Supreme Court is "willing and able to consider whether fundamental error occurred." *Ibid.* The dissent's further assertion that "when it engages in fundamental error review" that court "reaches the merits of the claim," *id.*, at 549, n. 9, is what the Court rejected.

However clear this may be on careful reading, the *Sochor* Court's rejection of the dissent's broad interpretation of "merits" (and consequently narrow interpretation of independence) was not sufficient to preclude an even greater departure by the Ninth Circuit in the present case. Footnotes responding to dissents are not the best way to make precedent, as the copious briefing in *Mickens* v. *Taylor*, No. 00-9285, over one such footnote makes quite clear. This issue is important enough

to warrant a full explanation in a case where it is the central focus of briefing and argument.[1]

In short, "a United States court of appeals . . . has decided an important federal question in a way that conflicts with [a] relevant decision[ ] of this Court." Supreme Court Rule 10(c). The latter decision requires further elaboration, as its message has apparently not been conveyed.

III. The Court of Appeals' alternative holding that the state court did not invoke procedural default with sufficient clarity amounts to defiance of this Court's precedents.

Sandwiched in the middle of the Court of Appeals' analysis of the independence of the state ground is this most remarkable paragraph:

> "It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review." *Smith* v. *Stewart*, 241 F. 3d 1191, 1196-1197 (CA9 2001).

This paragraph appears to state an alternative basis for disregarding the procedural default in this case, *i.e.*, even if the

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1. The point was briefed and argued in *Sochor*, but not thoroughly, as it was not the main point. See Brief for Respondent in *Sochor* v. *Florida*, No. 91-5843, pp. 26-27, n. 24; Reply Brief for Petitioner in *Sochor* 4-5; Tr. of Oral Arg. in *Sochor* 18-23.

state rule is independent, it was not invoked with sufficient clarity in this case. This is the Court of Appeals' entire discussion of this issue. This paragraph is remarkable not only for its brevity, but also for the complete absence of any citation of authority for the stated "requirement." A likely reason for this absence is that the on-point Supreme Court precedent is squarely to the contrary.

Because the Arizona Supreme Court denied review without explanation, the pertinent order in this case is that of the trial court. See *Ylst* v. *Nunnemaker*, 501 U. S. 797, 803 (1991). While the order is clear enough in its face, it becomes even more so when considered in the context of the rules it cites. Arizona Rule of Criminal Procedure 32.1 provides eight grounds for post-conviction relief. Paragraph (a) embraces all federal constitution claims, including the claim at issue in this case. Paragraphs (b) and (c) are for claims based on jurisdiction and sentence in excess of the legal maximum, respectively. These three paragraphs comprise one group for default purposes as discussed further below.

Paragraphs (e) and (h) provide relief in two "actual innocence" situations. Paragraph (e) requires newly discovered facts and diligence but has a relatively low burden of proof, while paragraph (h) lacks these prerequisites but has a higher burden of proof. Paragraph (d) is analogously for persons who ought not be in prison any longer, because they have "done their time." Paragraph (f) is for prisoners who have never had a review through no fault of their own, and paragraph (g) is for changes in the law. These paragraphs comprise the second group.

Rule 32.2 establishes the procedural default rule. Paragraph (a) precludes relief on defaulted claims for the first group. Paragraph (b) applies a more generous rule to the second group of claims, which are more likely to involve actual miscarriages of justice. The petitioner must give reasons for successive or untimely filing, however. Cf. *Wainwright* v. *Sykes*, 433 U. S. 72, 87 (1977) ("cause-and-prejudice").

In the present case, the state trial court unambiguously found the claim precluded, expressly citing Rule 32.2(a). The court went on to hold that to the extent petitioner claimed the benefit of the more generous Rule 32.2(b), he had failed to meet the prerequisite of that rule. The paragraph preceding this holding states that the court did not regard the mere fact that he had been represented on his prior petition by an attorney in the same office as the one who had represented him at trial to be a sufficient showing. App. to Pet. for Cert. C-2.

The term "clearly and expressly," in the context of independent state grounds, comes from *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983), where this Court stated, "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." This statement is not the holding of the case but rather a qualification to the holding, and it must be read in that context. The holding is, "when, as in this case, a state court decision *fairly appears to rest primarily on federal law*, or to be interwoven with federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.*, at 1040-1041 (emphasis added). The same rule applies to habeas cases. See *Harris* v. *Reed*, 489 U. S. 255, 263 (1989).

For two years after *Harris*, there was a plausible argument that its truncated statement of the *Long* rule, see *ibid.*, had imposed a "clearly and expressly" requirement on *all* procedural default holdings. That was precisely the habeas petitioner's contention in *Coleman* v. *Thompson*, 501 U. S. 722, 735-736 (1991). The Court emphatically rejected the argument, noting "Coleman has read the rule out of context." *Id.*, at 736. The *Long* presumption, and hence the "clearly and expressly" requirement, "appl[ies] only on those cases in which ' "it fairly appears that the state court rested its decision primarily on

federal law." ' *Harris*, *supra*, at 261, quoting *Long*, 463 U. S., at 1040." *Ibid.*

The Court of Appeals in the present case simply plowed ahead and applied the "clearly and expressly" requirement as if *Coleman* had been decided the other way. We know the Court of Appeals was aware of *Coleman*, having cited it for a related point only four paragraphs earlier. See *Smith*, 241 F. 3d, at 1195. Such a flagrant disregard for controlling Supreme Court precedent approaches judicial lawlessness.

The Court of Appeals' conclusion that there is ambiguity in the procedural basis of the state ruling shows a similar disregard for controlling precedent. Again, *Coleman* is the leading case. In *Coleman*, the requisite clarity was found in the state court's order that it was granting the state's motion to dismiss, a motion based on procedural grounds. See 501 U. S., at 740. In the present case, we have the much more explicit statement that the claim is precluded, with citation to the procedural default rule. In *Coleman*, there was some ambiguity added by the state court's statement that it had considered all the papers, which included briefing on the merits, "but we simply cannot read [this statement] as overriding the court's explicit grant of a dismissal motion based solely on procedural grounds." *Id.*, at 744. In the present case, the only basis for any claim of ambiguity is in the state court's finding that the allegation the public defender withheld a valid claim was not credible. See App. to Pet. for Cert. C-2.

No rational person could compare the order in the present case with the one in *Coleman* and find this one to be the less clear of the two. To the extent they differ, the differences point the other way. The two cases are so remarkably similar, and *Coleman* is such an important case in this area, that even a minimal respect for precedent would seem to require an explanation of why the Court of Appeals thinks *Coleman* is distinguishable. Instead, we have a cavalier, citation-free single paragraph brushing aside the state court's explicit, chapter-and-verse citation of the state procedural default rule.

The Court of Appeals' holding on the supposed unclarity of the state court order's basis is also squarely contrary to *Sochor* v. *Florida*, 504 U. S. 527 (1992). In *Sochor*, a simple "statement that 'the claim was not preserved for appeal' " was clear enough. *Id.*, at 535, n. *. The fact that the state court also said the claim was without merit did not render it any less clear. See *ibid.* In the present case, the state court's explicit citation of the procedural default rule makes the basis more clear than it was in *Sochor*.

The general rule in the American judicial system is that state courts are competent to decide federal questions, subject to review only by this Court, not the lower federal courts. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 898-903 (1998). Habeas corpus is a unique exception for constitutional claims by prisoners in state custody. The purposes of this extraordinary review by a coordinate court is to force the state courts "to toe the constitutional mark." See *Mackey* v. *United States*, 401 U. S. 667, 687 (1971) (Harlan, J., concurring in the judgment).

This Court has long recognized the problems in habeas review, both in the delicacy of relations between state and federal courts, see *Ex parte Royall*, 117 U. S. 241, 250-253 (1886), and in the costs to society of lack of finality. See *Coleman*, 501 U. S., at 748. Congress, too, has shown its concern over the rampant abuse of the habeas power and curtailed it in the Antiterrorism and Effective Death Penalty Act of 1996, §§ 101-107, 110 Stat. 1214, 1217-1226. See also *Calderon* v. *Thompson*, 523 U. S. 538, 554-557 (1998).

The lower federal courts, in exercising their authority in this sensitive area, must themselves take great care to "toe the mark." That is, this extraordinary jurisdiction must be exercised with scrupulous adherence to its limits. Federal courts must obey the Court's precedents in all cases, of course, but especially so when they exercise a function normally reserved to this Court alone, reviewing cases already decided by the highest courts of the states.

Regrettably, in capital cases in the Ninth Circuit the people of the states have suffered a recurring pattern of abuse of judicial authority that has required unusual orders and prompted unusually harsh rebukes from this Court. See, *e.g.*, *Vasquez* v. *Harris*, 503 U. S. 1000 (1992); *Calderon* v. *Thompson*, 523 U. S., at 552. We now see the systematic nullification of this Court's jurisprudence on procedural default, as state rules are declared "inadequate" or not "independent" on the flimsiest of excuses,[2] and perfectly clear default rulings are declared unclear by conjuring up imaginary ambiguities. This is not the rule of law. This is not why we have federal courts. This is a pure example of exercising will instead of judgment. Cf. The Federalist No. 78, p. 469 (C. Rossiter ed. 1961) (Hamilton).

This decision goes far beyond the kinds of errors and splits of authority that would normally call for a writ of certiorari. Cf. Supreme Court Rule 10. This is a matter of the integrity of the federal judiciary. The actions of the Ninth Circuit are so far beyond the pale that exercise of this Court's certiorari jurisdiction is imperative.

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2. The present case continues the pattern of *McKenna* v. *McDaniel*, 65 F. 3d 1483 (CA9 1985), cert. denied, 517 U. S. 1150 (1996), discussed *supra*, at 4, *Fields* v. *Calderon*, 125 F. 3d 757, 763 (CA9 1997), cert. denied, 523 U. S. 1132 (1998), and *Park* v. *California*, 202 F. 3d 1146, 1153 (CA9 2000), cert. denied, 531 U. S. 918 (2000) among other cases.

CONCLUSION

The petition for writ of certiorari should be granted.

September, 2001

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

Per Curiam

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* ROBERT DOUGLAS SMITH

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01–339. Decided December 12, 2001

PER CURIAM.

Respondent Robert Douglas Smith was convicted in 1982 of first-degree murder, kidnaping, and sexual assault. He was sentenced to death on the murder count, and consecutive 21-year prison terms for the other counts. After a series of unsuccessful petitions for state postconviction relief, respondent filed a federal petition for a writ of habeas corpus under 28 U. S. C. §2254 (1994 ed. and Supp. V) in the United States District Court for the District of Arizona. The petition alleged that his trial and appellate counsel were ineffective for failing to challenge various trial errors. Respondent had previously brought these ineffective assistance claims in 1995 in a petition for state postconviction relief pursuant to Arizona Rule of Criminal Procedure 32 (West 2000). The Pima County Superior Court denied his claims, finding them waived under Arizona Rule 32.2(a)(3) because respondent failed to raise them in his previous two Rule 32 petitions. In doing so, it rejected as "outrageous" respondent's argument that his failure to raise these claims was also due to ineffective assistance—in particular, that his prior appellate and Rule 32 counsel, who are members of the Arizona Public Defender's office, refused to file ineffective assistance of counsel claims because his trial counsel was also a member of the Public Defender's office. App. to Pet. for Cert. D–1.

On federal habeas, the United States District Court held

respondent's claims barred by the Pima County Superior Court's procedural ruling. The court rejected respondent's allegations that a conflict between his appellate and Rule 32 counsel's responsibility toward respondent and their allegiance to the Public Defender's office was cause for his procedural default in state court. The Court of Appeals for the Ninth Circuit reversed, holding that the state procedural default was not independent of federal law and thus did not bar federal review of the merits of respondent's claim, 241 F. 3d 1191, 1196 (2001) (citing *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985)). It reasoned that Arizona Rule 32.2(a)(3) applies a different standard for waiver depending on whether the claim asserted in a Rule 32 petition was of "sufficient constitutional magnitude," Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), and that determination whether a claim is of sufficient magnitude required, at the time the Superior Court ruled on respondent's ineffective assistance claims, consideration of the merits of the claim, 241 F. 3d, at 1197 (citing *State* v. *French*, 198 Ariz. App. 119, 121–122, 7 P. 3d 128, 130–131 (2000); *State* v. *Curtis*, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995)).

We hereby grant certiorari to review the Ninth Circuit Court of Appeals' determination that the Pima County Superior Court's procedural ruling was not independent of the merits of respondent's claims of ineffective assistance of trial and appellate counsel under the Sixth Amendment.* In order to determine whether the District Court may review these claims, we first must know whether the Court of Appeals properly interpreted Arizona law concerning Rule 32.2(a)(3). Therefore, we certify the following

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*We also grant respondent's motion for leave to proceed *in forma pauperis* and the motion of the Criminal Justice Legal Foundation for leave to file a brief as *amicus curiae*.

question to the Arizona Supreme Court pursuant to that court's rule concerning Certification of Questions of Law from Federal and Tribal Courts (Ariz. Sup. Ct. Rule 27 (West 2000)):

> At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see *State* v. *French*, 198 Ariz. App. 119, 121–122, 7 P. 3d 128, 130–131 (2000); *State* v. *Curtis*, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see *State* v. *Espinosa*, 200 Ariz. App. 503, 505 29 P. 3d 278, 280 (2001)?

We respectfully request that the Arizona Supreme Court accept our certification petition. That court's answer to this question will help determine the proper state-law predicate for our determination of the federal constitutional questions raised in this case.

The Clerk of this Court is directed to transmit to the Supreme Court of Arizona an original and six certified copies of this opinion, the briefs and records filed in this Court in this case, and a list of the counsel appearing in this matter along with their addresses and telephone numbers, pursuant to Ariz. Sup. Ct. Rules 27(a)(3)(c) and (a)(4) (West 2000). Judgment and further proceedings in this case are reserved pending our receipt of a response from the Supreme Court of Arizona.

It is so ordered.

No. 01-339-CFH

Title: Terry L. Stewart, Director, Arizona Department of Corrections, Petitioner
v.
Robert Douglas Smith

CAPITAL CASE

Docketed:
August 27, 2001

Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Aug 13 2001	Petition for writ of certiorari filed. (Response due September 26, 2001)
	Sep 26 2001	Brief of respondent Robert Douglas Smith in opposition filed.
	Sep 26 2001	Motion of respondent for leave to proceed in forma pauperis filed.
	Sep 26 2001	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae filed.
	Oct 10 2001	DISTRIBUTED for Conference of October 26, 2001
	Oct 10 2001	Reply brief of petitioner Terry L. Stewart filed.
	Oct 24 2001	Record requested.
	Nov 9 2001	Record filed.
	Nov 14 2001	REDISTRIBUTED for Conference of November 30, 2001
	Nov 21 2001	Record filed.
	Dec 3 2001	REDISTRIBUTED for Conference of December 7, 2001
	Dec 12 2001	Motion of respondent for leave to proceed in forma pauperis GRANTED.
	Dec 12 2001	Motion of Criminal Justice Legal Foundation for leave to file a brief as amicus curiae GRANTED.
	Dec 12 2001	Petition GRANTED. Question certified to the Supreme Court of Arizona. Judgment and further proceedings reserved pending receipt of response from the Supreme Court of Arizona. Opinion per curiam. (Detached opinion.)
		**********
	Dec 12 2001	The following certified question to the Supreme Court of Arizona: At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of "sufficient constitutional magnitude" to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see State v. French, 198 Ariz. App. 119, 121-122, 7 P. 3d 128, 130-131 (2000); State v. Curtis, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see State v. Espinosa, 200 Ariz. App. 503, 505 29 P. 3d 278, 280 (2001)?
	Dec 12 2001	CERTIFIED QUESTION ISSUED to Supreme Court of Arizona with complete records from United States Court of Appeals for the Ninth Circuit and from the United States District Court for the District of Arizona. (1-envelope and 6-boxes). Also copies of certified copy mailed to the USCA for the Ninth Circuit, USDC for the District of Arizona and all counsel of record in this case.

2 pp

Entry	Date	Proceedings and Orders
	Jun 14 2002	Answer to certified question filed.
	Jun 17 2002	Motion (Answer to Certified Question) DISTRIBUTED. June 20, 2002 (Page 18)
	Jun 18 2002	Certified record received back from Supreme Court of Arizona (6 boxes).
	Jun 24 2002	Motion (Answer To Certified Question) REDISTRIBUTED. June 27, 2002 (Page 22)
	Jun 28 2002	Adjudged to be REVERSED and REMANDED Opinion per curiam. (Detached opinion.)

ORIGINAL

NO. 01-339

Supreme Court, U.S.
FILED
SEP 26 2001
CLERK

In the

Supreme Court of the United States

♦

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ROBERT DOUGLAS SMITH,

Respondent.

♦

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Ninth Circuit

♦

RESPONDENT'S BRIEF IN OPPOSITION

S. JONATHAN YOUNG*
WILLIAMSON AND YOUNG, P.C.
177 NORTH CHURCH AVENUE
SUITE 807
TUCSON, AZ 85701
(520) 792-3123

ROBERT J. HIRSH
HIRSH, BJORGAARD & ROGERS, P.L.C.
177 NORTH CHURCH AVENUE
SUITE 700
TUCSON, AZ 85701
(520) 624-4790

Attorneys for Respondent
**Counsel of Record*

QUESTIONS PRESENTED

I

(A) DOES THE REQUIREMENT OF AKE V. OKLAHOMA, 470 U.S. 68 (1985), THAT A STATE PROCEDURAL RULE BE INDEPENDENT OF FEDERAL LAW TO CONSTITUTE AN ADEQUATE AND INDEPENDENT STATE GROUND, APPLY IN HABEAS CORPUS PROCEEDINGS UNDER 28 U.S.C. §2254?

(B) IS THERE A CONFLICT IN THE COURTS OF APPEALS ON THIS ISSUE?

(C) DOES THE NINTH CIRCUIT'S HOLDING THAT A DETERMINATION OF WHETHER A POST-CONVICTION CLAIM IS OF "SUFFICIENT CONSTITUTIONAL MAGNITUDE" IS NOT INDEPENDENT OF FEDERAL LAW UNDER AKE V. OKLAHOMA, SUPRA, CONFLICT WITH THE LAW OF THE SIXTH, SEVENTH AND TENTH CIRCUITS?

II

(A) DID THE NINTH CIRCUIT MISINTERPRET RULE 32.2(a)(3) AND ARIZONA LAW IN FINDING THAT APPLICATION OF THE RULE REQUIRES A DETERMINATION OF THE CONSTITUTIONAL MAGNITUDE OF A POST-CONVICTION CLAIM?

(B) DID THE NINTH CIRCUIT CORRECTLY HOLD THAT THE ARIZONA COURTS DID NOT CLEARLY AND EXPLICITLY RELY ON A PROCEDURAL RULE IN DENYING RESPONDENT'S INEFFECTIVENESS CLAIM, AND THAT THERE WAS THEREFORE NO INDEPENDENT STATE GROUND FOR THE DENIAL OF THE CLAIM?

(C) DID THE NINTH CIRCUIT ERR IN REFUSING TO CERTIFY A QUESTION OF ARIZONA STATE LAW TO THE ARIZONA SUPREME COURT?

III

HAS THE COMMON LAW PROCEDURAL DEFAULT RULE OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) BEEN SUPERSEDED, IN ARIZONA CASES, BY 28 U.S.C. § 2264, UNDER WHICH PETITIONER IS PLAINLY ENTITLED TO FEDERAL CONSIDERATION OF HIS CONSTITUTIONAL CLAIMS BECAUSE ARIZONA DID NOT AFFORD HIM THE POSTCONVICTION REPRESENTATION IT HAS OBLIGATED ITSELF TO PROVIDE IN ORDER TO "OPT IN" TO CHAPTER 154 OF THE AEDPA?

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IN THE

SUPREME COURT OF THE UNITED STATES

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully prays that Petitioner's Petition For Writ Of Certiorari to review the judgment below be denied.

♦

OPINIONS BELOW

The opinion of the Ninth Circuit Court Of Appeals appears at Appendix A to the Brief in Opposition and is reported at Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001).

The Order of the United States District Court of Arizona denying the Supplemental Petition appears at Appendix B to the Brief In Opposition and is unpublished. Smith v. Lewis, (No. CIV 87-234 TUC RMB filed October 31, 1996.)

The Decision of the United States District Court of Arizona denying the Amended Petition appears at Appendix C to the Brief in Opposition and is unpublished. Smith v. Lewis (filed September 5, 1996.)

♦

JURISDICTION

The date on which the Ninth Circuit Court of Appeals decided the case was March 6, 2001.

A Petition For Rehearing and Suggestion For Rehearing En Banc filed by Petitioner was denied by the Ninth Circuit Court of Appeals on May 15, 2001, and a copy of the order denying rehearing appears at Appendix D.

The jurisdiction of this Court is under 28 U.S.C. §1254(1).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure:

Rule 32.2. Preclusion of remedy

a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:

* * *

(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

Ariz. R.Crim.P. 32.2(a)(3).

2. Comment to Rule 32.2 (a)(3) of the Arizona Rules of Criminal Procedure:

The pre-1992 version of Rule 32.2(a)(3) indicated that a defendant must "knowingly, voluntarily and intelligently" not raise an issue at trial, on appeal, or in a previous collateral proceeding before the issue was precluded. See, Faye v. Noya, (sic) 372 U.S. 392 (1963). While that is the correct standard of waiver for some constitutional rights, it is not the correct standard for other trial errors. Accordingly, some issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved. If an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant "knowingly, voluntarily and intelligently" waived the claim. For most claims of trial error, the state may simply show that the defendant did not raise the error at trial, on appeal, or in a previous collateral proceeding, and that would be sufficient to show that the defendant has waived the claim. If defense counsel's failure to raise an issue at trial, on appeal or in a previous collateral proceedings (sic) is so egregious as to result in prejudice as that term has been constitutionally defined, such failure may be raised by means of a claim of ineffective assistance of counsel.

Ariz.R.Crim.P. 32.2(a)(3), cmt.

♦

STATEMENT OF THE CASE

On March 30, 1982, a Pima County, Arizona jury found Respondent and his codefendant, Joseph Lambright, guilty of the offenses of kidnapping, sexual assault and first degree murder of Sandra Owen on March 11, 1980. (Apps. E and F.) On May 27, 1982, the trial court sentenced Respondent to death on the murder conviction. (App. E.) Lambright was also sentenced to death. (App. F.) In companion decisions dated September 23, 1983, the Arizona Supreme Court affirmed the convictions and death sentences of both defendants. (Apps. E and F.)

On April 20, 1984, Respondent filed his first Petition For Post-Conviction Relief under Rule 32 of the Arizona Rules of Criminal Procedure ("Rule 32 Petition") in state court. (App. C at C-3.) The first Rule 32 Petition was denied on April 17, 1985, and the Arizona Supreme Court denied review. (Id.)

On April 14, 1987, Respondent filed a Petition For Writ Of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court for the District of Arizona in Tucson, Arizona. (Id.) Because the Petition continued a number of unexhausted claims on December 14, 1988, the District Court dismissed the Petition without prejudice so that Respondent could exhaust his unexhausted claims in state court. (Id.)

On December 8, 1989, Respondent filed his second Rule 32 Petition. (Id.) On August 8, 1991, the trial court denied the second Rule 32 Petition, and the Arizona Supreme Court denied review. (Id.) On January 3, 1994, Respondent filed an Amended Petition in District Court which included the claims raised in the second Rule 32 Petition. (Id.)

In all of the foregoing proceedings, Respondent was represented by attorneys of the Office of the Pima County Public Defender in Tucson, Arizona. (App. A at A-4.)[1] In September of 1994, Respondent wrote a letter to Judge Richard M. Bilby, the judge presiding over Respondent's federal habeas proceedings, and told him that he wished to raise claims of ineffective assistance of counsel relating to his trial and sentencing counsel, but that his present counsel, John Palumbo, had told him that he could not raise such a claim because trial counsel was a member of his Office. (Id. at A-4, A-5.) Respondent requested in the letter that Judge Bilby appoint an attorney to "work with" Palumbo and represent him on claims of ineffective assistance of counsel against his trial counsel. (Id. at A-5.) Judge Bilby granted Respondent's request and appointed undersigned counsel S. Jonathan Young, a private attorney, to represent Respondent on his ineffectiveness claims. (Id.)

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[1] Thomas Hippert represented Respondent at trial and sentencing. Lawrence Fleicshman represented Respondent on direct appeal and the first Rule 32 Petition. John Palumbo represented Respondent on his second Rule 32 Petition and on his initial and Amended Habeas Petitions. (App. B at 1-2.)

On June 9, 1995, undersigned counsel Young filed a third Rule 32 Petition raising numerous claims and allegations of ineffective assistance of counsel by the Public Defender's Office, including a claim that Respondent's trial counsel rendered ineffective assistance during his sentencing proceedings. (Id.) The Petition contained an affidavit by John Palumbo that the Pima County Public Defender had a policy that prohibited its attorneys from alleging ineffectiveness of other attorneys in the office. (App. A at A-5.) The trial court denied the third Rule 32 Petition, however, and the Arizona Supreme Court denied review. (A at A-5; App. G; App H.)

On August 23, 1996, undersigned counsel Young filed a Supplemental Petition For Writ Of Habeas Corpus and Supporting Memorandum raising Respondent's ineffectiveness claims. (App. A at A-5; App. B)

In an Amended Memorandum Opinion And Order dated September 5, 1996, the District Court denied the Amended Petition For Writ Of Habeas Corpus and Respondent's non-ineffectiveness claims. (App. C.) In an Order dated October 30, 1996, the District Court denied the Supplemental Petition For Writ Of Habeas Corpus and Respondent's ineffectiveness of counsel claims on the ground that those claims were procedurally defaulted. (App. B.)

On appeal to the Ninth Circuit, the court granted relief on one of Respondent's trial claims (dual jury issue), but the court granted Petitioner's Motion For Rehearing En Banc and reversed that ruling. See, Lambright v. Stewart, 191 F.3d 1181 9th Cir. 1999). The court then remanded the case to the original panel for consideration of Respondent's remaining trial and sentencing claims. Id. In Smith v. Stewart, 241 F.3d 1191 (2001), the court granted relief on Respondent's claim of ineffective assistance of counsel at sentencing, holding that there was "no doubt" that Respondent had established a colorable claim on that issue, and that the state court had erred in denying Respondent's request for an evidentiary hearing on that issue. (App. A at A-11 to A-17.)[2] The court therefore ordered that the case be remanded

[2] The evidence of ineffective assistance relied upon by the Ninth Circuit was, *inter alia*, (i) counsel's failure to investigate, or present evidence of, Respondent's "miserable" childhood, mental disabilities and mental impairment at the time of the offense, (ii) his sole and inexplicable]" reliance on the immunity agreement obtained by the State's primary witness, and the "great loss" suffered by

to the District Court for an evidentiary hearing on the claim of ineffective assistance at sentencing. (Id. at A-17.)[3] In reaching the merits of Respondent's ineffectiveness at sentencing claim, the court held that the District Court had erred in finding that Respondent's claims were procedurally defaulted, because there was no independent state ground for the Arizona courts' denial of the claim. (Id. at A-7 to A-11.)[4]

Petitioner filed a timely Petition For Rehearing and Suggestion For Rehearing En Banc of the foregoing decision in Smith v. Stewart, and that Petition was denied by Order dated May 15, 2001. (App. D.) On August 13, 2001, Petitioner filed a timely Petition For Writ of Certiorari in this Court.

♦

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court to deny the Writ for the following reasons.

I

A

The Ninth Circuit Correctly Relied Upon the "Independent State Procedural Rule" Requirement Of Ake v. Oklahoma In The Habeas Proceedings In This Case.

Petitioner contends that the Ninth Circuit's reliance upon the "independent state procedural rule" requirement of Ake v. Oklahoma, 470 U.S. 68 (1985), to find that there was no procedural default of Respondent's claim was error, and conflicts with a decision of the Fourth Circuit which addressed the

the victim's family, as reasons not to impose death, and (iii) his "rambling" explanation of his own moral opposition to the death penalty. (App. A at -4, 11-17.) The court described counsel's performance in the sentencing proceedings as "woefully inadequate". (Id. at 13.)

[3] The court denied relief on all of Respondent's other claims in a separate unpublished opinion. See Lambright v. Stewart, 2001 WL 228668.

[4] In light of its holding that there was no independent state ground for the denial of the claim, the court stated that there was no need to address Respondent's argument that the policy of the Pima County Public Defender preventing its attorneys from attacking the competency of any other attorney in the office was an "external" and "objective factor" constituting cause and prejudice for the procedural default. (Id. at A-7, A-8, n.3.) The court stated, however, that the argument "appears to have merit", citing Manning v. Foster, 224 F.3d 1129, 1134 (9th Cir. 2000.) (Id.)

issue of whether Ake, a direct review case, applies in habeas proceedings under 28 U.S.C.§2254. (Pet. for Cert. at 7-15.) This contention is incorrect.

Petitioner's contention that Ake does not apply in habeas proceedings is based entirely on the following language in Coleman v. Thompson, 501 U.S. 722 (1991), concerning Ake:

> **Ake was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if Ake applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.**

504 U.S. at 741. This language is dicta on the issue of whether Ake applies to habeas proceedings, as this Court effectively held that it did not have to decide that issue given the Virginia procedural rule's independence of federal law. An examination of this Court's habeas decisions shows that the "independent state procedural rule" requirement of Ake does apply in habeas.

In Wainwright v. Sykes , 433 U.S. 72 (1977), this Court held that the doctrine of "adequate and independent state ground" applies in habeas proceedings, and allowed a federal court to refuse to review a constitutional claim because the state court had declined to rule on the claim due to the petitioner's failure to comply with a state procedural rule, and the state court ruling was therefore not "independent" federal law. 433 U.S. at 81-87. This Court held that:

> **We therefore conclude that Florida procedure did, consistently with the United States Constitution, require that respondents' confession be challenged at trial or not at all, and thus his failure to timely object to its admission amounted to an independent and adequate state procedural ground which would have prevented direct review here. See, Henry v. Mississippi, 379 U.S. 433, 85 S.Ct. 5644, 13 L.Ed.2d 408 (1965).**

Id. at 86-87, emphasis added. This Court's reliance on Henry v. Mississippi, 379 U.S., 433 (1965), a direct review case, to hold in Sykes that the adequate and independent state ground doctrine applies in habeas cases, is an early indication that this Court intended the doctrine to have equal and coextensive application in direct review and habeas cases.

In County Court Of Ulster County, New York v. Allen, 442 U.S. 140 (1979), this Court relied upon Wainwright v. Sykes, supra, and recognized the existence of the adequate and independent state ground doctrine in habeas proceedings, but reached a different result than Sykes. This Court held that New York's contemporaneous objection rule was not an independent state ground for the denial of the

petitioner's claim because, unlike Sykes, it had not been shown that New York law required a contemporaneous objection to this type of instructional error, or that the state court had relied on any such state procedural rule in denying the claim. Id, at 147-154. In so applying the independent state ground doctrine, this Court stated that:

> **Our conclusion that it was proper for the federal courts to address respondents' claim is confirmed by the policies informing the "adequate state ground" exception to habeas corpus jurisdiction. The purpose of that exception is to accord appropriate respect to the sovereignty of the States in our federal system. Wainwright v. Sykes, 433 US, at 88, 53 L.Ed.2d 594 97 S.Ct. 2497. But if neither the state legislature nor the constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim.**

Id. at 154, footnote omitted, emphasis added. In holding that the adequate and independent state ground doctrine applies throughout "our federal system", this Court again indicated that the doctrine applies equally and coextensively in direct review and habeas cases.

It was in Harris v. Reed, 489 U.S. 255 (1989), however, that this Court first specifically held that a direct review case relating to the independent state ground doctrine applied equally and coextensively to a habeas case. In Harris, this Court held that the "plain statement" rule established in Michigan v. Long, 463 U.S. 1032 (1983), and Caldwell v. Mississippi, 472 U.S. 320 (1985), both direct review cases, applied equally to habeas cases. 489 U.S. at 257-266, In Long, this Court held that when it is presented with a federal constitutional issue on direct review, it will find jurisdiction to review the claim:

> **in the absence of a plain statement that the decision below rested on an adequate and independent state ground.**

463 U.S. at 1043. This Court also held that when faced with an ambiguous state court decision, it will presume that no adequate and independent state ground was relied on, and will review the federal claim. Id. at 1042.[5] In Caldwell v. Mississippi, supra, this Court held, relying on Long, that in determining

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[5] This Court summarized the plain statement rule in Long as follows:

> **In determining, as we must, whether we have jurisdiction to review a case that is alleged to rest on adequate and independent state grounds, we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground**

whether jurisdiction exists on direct review:

> **[...W]e will not assume that a state-court decision rests on adequate and independent state grounds when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion." Michigan v. Long, 463 US 1032, 1040-1041[.] "If the state court decision clearly and expressly indicates that it is alternatively based on bona fide separate, adequate and independent grounds, we, of course, will not undertake to review the decision." Id., at 1041[.]**

472 U.S. at 327.

In applying "plain statement" rule and presumption of no independent state ground of Long and Caldwell to habeas cases, Harris establishes that decisions of this Court relating to the adequate and independent state ground doctrine apply equally and coextensively to habeas cases. As stated in Harris:

> **Although Long and Caldwell arose on direct review, the principles underlying those decisions are not limited to direct review. Indeed, our opinion in Caldwell relied heavily upon our earlier application of the adequate and independent state ground doctrine to habeas review in Ulster County. See Caldwell, 472 US, at 327-328, 86 L Ed 2d 231, 105 S Ct 2633. Caldwell thus indicates that the problem of ambiguous state-court references to state law, which led to the adoption of the Long "plain statement" rule, is common to both direct and habeas review. Faced with a common problem, we adopt a common solution: a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case "clearly and expressly" states that its judgment rests on a state procedural bar. Caldwell, 472 US, at 327, 86 L Ed 2d 231, US, at 1041, 77 L Ed 2d 1201, 103 S Ct 3469.**

489 U.S. at 263, footnote omitted.

In Coleman v. Thompson, 501 U.S. 722 (1991), this Court reaffirmed its decisions in Sykes, Ulster County and Harris, supra, and held that the adequate and independent state ground doctrine applies in habeas cases, as well as direct review cases. 501 U.S. at 729-730. In so holding, this Court discussed the question of whether the doctrine applied differently in habeas cases than it does in direct review cases. Id. at 730. This Court observed that one difference between direct review and habeas cases is that in the former case it is reviewing whether the judgment of the state court violated federal law, while in the latter

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> **and when it fairly appears that the state court rested its decision primarily on federal law.**
>
> Id., citation omitted.

case the federal courts are reviewing whether the custody of the defendant violated federal law. Id. This Court further observed, however, that:

> **Nonetheless, a state prisoner is in custody pursuant to a judgment. When a federal habeas court releases a prisoner held pursuant to a state court judgment that rests on an independent and adequate state ground, it renders ineffective the state rule just as completely as if this Court had reversed the state judgment on direct review. In such a case, the habeas court ignores the State's legitimate reasons for holding the prisoner.**

Id., emphasis in original, citation omitted. Based on this reasoning, this Court stated that Harris had correctly held that the "plain statement" rule and presumption of Long and Caldwell applied to habeas cases. Id. at 730-735. Moreover, this Court emphasized that the rule was to be applied equally and coextensively in all such cases:

> **It is unmistakably clear that Harris applies the same presumption in habeas that Long and Caldwell adopted in direct review cases in this Court. See Harris, 489 U.S., at 263, 109 S.Ct. ("Faced with a common problem we adopt a common solution"); see also id., at 264, 103 L Ed 2d 308, 109 S Ct 1038 ("Under our decision today, a state court need do nothing more to preclude habeas review than it must do to preclude direct review"). Indeed, the quoted passage purports to state the rule "on either direct or habeas review." Harris, being a federal habeas case, could not change the rule for direct review; the reference to both direct and habeas review makes plain that Harris applies precisely the same rule as Long.**

Id. at 736. Finally, however, the Court held that the presumption of "no independent state ground" did not apply in Coleman's case because it did not "fairly appear" from the state court decision that it rested primarily on federal law, or was interwoven with federal law. Id. at 735-740.[6] This Court thus held Coleman's claim to be procedurally defaulted and that Coleman had failed to show cause and prejudice for that default. Id. at 740-757.

The above decisions of this Court show that the adequate and independent state ground doctrine applies equally and coextensively in direct review and habeas cases, and that decisions in one area are fully applicable and relevant to the other area.[7] It must be concluded, therefore, that Ake v. Oklahoma,

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[6] Coleman failed to file a timely notice of appeal from his murder conviction and death sentence, and that was the sole basis for the state court's ruling denying Coleman's petition for appeal. Id. at 726-728.

[7] See e.g., Harris, supra, 489 U.S. at 257-266 and Coleman, supra, 501 U.S. at 737-740 (adopting and applying Long and Caldwell to habeas); Caldwell,

a direct review case concerning the independent state ground doctrine, is fully applicable and relevant to habeas cases, and that the Ninth Circuit therefore correctly relied upon and applied Ake to this case.

Consistently with the cases of this Court discussed above which hold that a state court's ruling on a constitutional claim must be independent of federal law to be an independent state ground, Ake holds that the state procedural rule relied upon by the state court in denying the claim must also be independent of federal law. Ake, supra, 470 U.S. at 74-75. Ake had contended in his capital sentencing proceedings that as an indigent he was entitled under the Due Process Clause to the expert assistance of a psychiatrist to counter the expert testimony of the State's psychiatrist that Ake was likely to be dangerous in the future. Id. at 70-74. The State heavily relied on that testimony to argue that Ake be sentenced to death, and the trial court imposed death. Id. at 73-74. On appeal, the court held that there was no constitutional error, and also held that the claim was waived on appeal under Oklahoma law because Ake had not repeated his request for an expert in his motion for new trial. Id. On direct review by this Court, the State argued that the Court of Appeals' finding of waiver was an independent state ground for the state court's decision. Id. at 74-75. This Court rejected that argument, however, because the state's waiver rule had an exception under Oklahoma case law for claims of "fundamental trial error," which included federal constitutional error. Id. This Court held that since Oklahoma's procedural rule required the state court to determine whether a federal constitutional error had occurred before it could apply the rule, it was not independent of federal law, and could not be used to establish an independent state ground for the denial of Ake's claim. Id. Accordingly, this Court held that Ake's claim was not subject to procedural default, and heard the merits of his claim and ruled in his favor. Id. at 74-87.

Ake is an essential component of the independent state ground doctrine. Without examination and consideration of the procedural rule that a state court relied upon in denying a federal claim, it is impossible to accurately determine whether the state's ruling on the federal claim was truly independent of federal law. This point is illustrated by Ake itself. This Court recognized that on its face, the state

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supra, 472 U.S. at 327 (relying on Ulster County); Sykes, supra, 433 U.S. at 86-87 (relying on Henry v. Mississippi); see also Victor v. Nebraska, 511 U.S. 1, 18-19 (1994) (relying on Ylst v. Nunnemaker, 501 U.S. 797, 801 (1991)).

court's ruling that Ake's federal claim was waived under Oklahoma law was an independent state ground for denying the claim as it was a "state-law ruling." 470 U.S. at 74. However, when this Court examined the Oklahoma procedural rule applicable to Ake, it was able to determine that the state court's ruling was not, and could not be, independent of federal law, because:

> **[B]efore applying the waiver doctrine to a constitutional question, the state court must rule, either explicitly or implicitly, on the merits of the constitutional question.**

470 U.S. at 75, emphasis added. Thus, this Court held that "[d]espite the court's state-law ruling", id. at 74, emphasis added, the ruling was not an independent state ground because the state court was required to decide a federal question to determine whether the procedural rule applied to Ake's claim. The essential holding of Ake was, therefore, that since the Oklahoma procedural rule in question was not independent of federal law, any ruling by the state court based on that rule could never be independent of federal law, and could not constitute an independent state ground.

Based upon the above decisions of this Court, a federal court must conduct a two-step analysis to determine if there is an independent state ground for a state court's decision denying a federal claim. First, the court must determine, as a threshold matter, whether the applicable state procedural rule is independent of federal law. Ake, supra. If it is not, then the analysis need go no further, as any state court decision based upon that rule could not be independent of federal law. Id. If the procedural rule is independent of federal law, however, then the court must complete the second step, and determine whether the state court's ruling is independent of federal law. Harris v. Reed, Michigan v. Long, Caldwell v. Mississippi, supra. If it is independent, then the independent state ground doctrine applies and the constitutional claim cannot be reviewed by the federal court. If the ruling is not independent, however, then the federal court may review the claim. Id. Consideration of both the state rule under Ake, as well as the state ruling under Harris, is necessary to a fair and accurate determination of whether an independent state ground exists. Adoption of Petitioner's position that Ake should not apply in habeas proceedings would significantly undermine that doctrine, and weaken the authority and ability of the federal courts to review federal questions in habeas. This Court has clearly indicated in the cases discussed above that the independent state ground doctrine must be applied equally and coextensively in

direct review and habeas cases, and that Ake, should therefore have full application and relevance in a habeas case for purposes of the independent state ground doctrine. This Court recognized this in Harris v. Reed, supra, when it cited and referred to Ake "[f]or a discussion on whether a state procedural default ruling is 'independent'[.]" 489 U.S. at 260-261, n.6. In addition, in the habeas case of O'Dell v. Thompson, 502 U.S. 995 (1991), three Justices, including two present Justices of this Court, cited Ake in dissenting from a denial of a petition for writ of certiorari, stating that:

> **The Virginia Supreme Court's dismissal of O'Dell's habeas petition should not deprive a federal habeas court of jurisdiction. Under Ake v. Oklahoma, the Virginia Supreme Court's rejection [of O'Dell's claim] may not be based on an independent state ground because Tharp v. Commonwealth requires the Virginia Supreme Court to consider whether a constitutional right was abridged before denying an extension of time for filing a petition for appeal.**

502 U.S. at 997-998, citation and footnote omitted. These statements further support the conclusion that Ake applies in habeas cases.

For all of the foregoing reasons, the requirement of Ake v. Oklahoma, that a state procedural rule be independent of federal law in order to constitute an independent state ground for denial of a constitutional claim, is fully applicable and relevant in habeas proceedings, and the Ninth Circuit properly and correctly relied on Ake in Respondent's habeas proceedings to find that the Arizona courts' denial of Respondent's ineffectiveness claim was not based upon an independent state ground.

B

There Is No Actual Conflict In The Circuits On The Issue Of Whether The "Independent State Procedural Rule" Requirement Of Ake Applies To Habeas.

Like the Ninth Circuit's decision in this case, the overwhelming number of Court of Appeals cases and District Court cases recognize that Ake applies to habeas cases as well as direct review cases.

The Second,[8] Eighth,[9] Ninth,[10] and Eleventh[11] Circuits have all cited and relied on Ake in habeas proceedings. In addition, District Court habeas cases from the Third Circuit have cited and relied on Ake.[12]

Petitioner contends, however, that the Fourth Circuit is in conflict with the Ninth Circuit's decision in this case applying Ake in habeas proceedings, and requests this Court to resolve the conflict. (Pet. for Cert. at 9-13.) Petitioner's contention is incorrect. The only Fourth Circuit case cited by Petitioner is O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996). O'Dell involved the same Virginia notice of appeal rule at issue as in Coleman v. Thompson, supra, and the court stated that it agreed with the decision in Coleman that Ake "does not apply in the habeas context." O'Dell, 95 F.3d at 1244. It also held, however, as Coleman did, that the Virginia notice of appeal rule was independent of federal law, and that the petitioner's claim was therefore based on a independent state ground. Id. O'Dell does not support Petitioner's position for several reasons. First, it incorrectly concludes that this Court held in Coleman that Ake does not apply to habeas. As stated previously, the Court only stated in Coleman that it had not previously applied Ake in habeas proceedings, and that assuming arguendo that Ake did apply in habeas, the Virginia notice of appeal rule was in fact independent of federal law, thereby establishing an independent state ground. Coleman, supra, 501 U.S. at 741. Thus, Coleman's statement

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[8] Bradley v. Meachum, 918 F.2d 338, 343 (2nd Cir. 1990); Roy v. Coxon, 907 F.2d 385, 390-391 (2nd Cir. 1990).

[9] Malone v. Vasquez, 138 F.3d 711, 717-718 (8th Cir. 1998); see also Olesen v. Class, 962 F.Supp. 1556, 1570 (D.C.S.D.).

[10] Park v. California, 202 F.3d 1146, 1152 (9th Cir. 2000); Bargas v. Burns, 179 F.3d 1207, 1214 (9th Cir. 1999); Harmon v. Ryan, 959 F.2d 1457, 1461 (9th Cir. 1991); see also, McLain v. Hill, 52 F.Supp.2d 1133, 1138-1139 (C.D.Cal. 1999); Karis v. Vasquez, 828 F.Supp. 1449, 1461, n.16 (E.D.Cal. 1993).

[11] Spivey v. Head, 207 F.3d 1263, 1283 (11th Cir. 2000); Card v. Dugger, 911 F.2d 1494, 1517 (11th Cir. 1990).

[12] Banks v. Horn, 49 F.Supp.2d 400, 405-406 (M.D.Pa. 1999); Johnson v. Ellingsworth, 783 F.Supp. 215, 219-220 (D.Del. 1992).

Respondent was unable to find any cases from the First or Fifth Circuits helpful on this issue.

about Ake was dicta, and not a holding binding on the Fourth Circuit. Second, the Fourth Circuit's own "holding" in O'Dell that Ake does not apply in habeas is itself dicta, because the court held, as Coleman did, that Virginia's notice of appeal rule was independent of federal law, and did not need to reach the Ake question. Third, and most importantly, however, O'Dell's statement that Ake does not apply to habeas has not been followed by the Fourth Circuit in any subsequent decision, and all Fourth Circuit cases following O'Dell have ignored it and recognized that Ake applies in habeas cases.[13] It can hardly be argued by Petitioner that O'Dell is in conflict with the Ninth Circuit when O'Dell is not even followed in its own Circuit. O'Dell, therefore, is an aberration, and the other Fourth Circuit decisions cited above show that the Circuit does not follow O'Dell and does apply Ake in habeas cases.

Finally, Petitioner also contends that the Ninth Circuit's decision in this case also conflicts with cases of the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 9-15.) This alleged conflict, however, is not based on whether Ake v. Oklahoma applies to habeas proceedings, and Petitioner concedes, as it must, that the Sixth, Seventh and Tenth Circuits, like the other Circuits mentioned previously, recognize the applicability of Ake to habeas cases. (Id. at 12.)[14] Petitioner contends, however, that these Circuits conflict with the Ninth Circuit's holding that a determination of whether a post-conviction claim in

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[13] Bacon v. Lee, 225 F.3d 470, 476 (4th Cir. 2000); Fisher v. Lee, 215 F.3d 438, 455 (4th Cir. 2000); Burket v. Angelone, 208 F.3d 172, 183 (4th Cir. 2000); Thomas v. Davis, 192 F.3d 445, 450 (4th Cir.1999); Yeatts v. Angelone 166 F.3d 255, 260 (4th Cir.1999); Fisher v. Angelone, 163 F.3d 835, 853 (4th Cir. 1998); Wright v. Angelone, 151 F.3d 151, 159 (4th Cir. 1998); Fitzgerald v. Greene, 150 F.3d 357, 366 (4th Cir. 1998); Boyd v. French, 147 F.3d 319, 331 (4th Cir. 1998); Williams v. French, 147 F.3d 203, 208-209 (4th Cir.1998); Gilbert v. Moore, 134 F.3d 642, 656 (4th Cir. 1998); Mu'Min v. Pruett, 125 F.3d 192, 196 (4th Cir. 1997); see also, Oken v. Nuth, 64 F.Supp.2d 488, 494 (D.Md. 1999).

[14] See Scott v. Mitchell, 209 F.3d 854, 865-868 (6th Cir. 2000); White v. Schotten, 201 F.3d 743, 751-752 (6th Cir. 2000); Willis v. Aiken, 8 F.3d 556, 567 (7th Cir. 1993); (questioning applicability of Ake but still determining whether state rule was independent of federal law); Duvall v. Reynolds, 139 F.3d 768, 796-797 (10th Cir. 1998); Maes v. Thomas, 46 F.3d 979, 985 (10th Cir. 1995); Brecheen v. Reynolds, 41 F.3d 1343, 1353 (10th Cir. 1996); Steele v. Young, 11 F.3d 1518, 1521-1522 (10th Cir. 1993); Andrews v. Deland, 943 F.2d 1162, 1188, n.40 (10th Cir. 1991); Gutierrez v. Moriarty, 922 F.2d 1464, 1468-1469 (10th Cir. 1991); Shafer v. Stratton, 906 F.2d 506, 509 (10th Cir. 1990); Brasier v Douglas, 815 F.2d 64, 65 (10th Cir. 1987); see also United States ex rel. Campos v. Peters, 827 F.Supp. 1359, 1362 (N.D.Ill. 1993).

Arizona is of "sufficient constitutional magnitude" under Rule 32.2(a)(3) is independent of federal law under Ake. This issue is discussed in the next subsection.

For the above reasons, the Petitioner's contention that there is a conflict in the Circuits on the issue of whether Ake applies to habeas cases is incorrect. Only one Fourth Circuit case, O'Dell v. Netherland, supra, has held that Ake does not apply to habeas cases. As stated above, however, that case has not been followed in the Fourth Circuit, and it therefore cannot fairly be said that O'Dell is the law of the Fourth Circuit. Thus, there is no real conflict in the Circuit Courts of Appeals on this issue, and the Petition should not be granted on this basis.

C

The Ninth Circuit Correctly Held That A Determination Of Whether A Post-Conviction Claim Is Of "Sufficient Constitutional Magnitude" Is Not Independent Of Federal Law, And That Holding Does Not Conflict With the Sixth, Seventh And Tenth Circuits.

The Ninth Circuit held that to determine whether a post-conviction claim is precluded under Rule 32.2(a)(3) of the Arizona Rules of Criminal Procedure, the Arizona state courts must first determine whether the claim is of "sufficient constitutional magnitude". Smith, supra, 241 F.3d at 1196-1197. The court also held that this determination is not independent of federal law, and is therefore not an independent state ground under Ake v. Oklahoma. Id. Petitioner contends, however, that the Ninth Circuit's decision conflicts with cases from the Sixth, Seventh and Tenth Circuits. (Pet. for Cert. at 11-15.) Petitioner's contention is incorrect.

The Sixth, Seventh and Tenth Circuit cases cited by Petitioner are all clearly distinguishable from this case because the state procedural rules at issue in those cases did not require a determination of federal law by the state court in order to apply the state procedural rule.

In Scott v. Mitchell, 209 F.3d 854 (6th Cir. 2000), the court considered whether an Ohio procedural rule requiring a contemporaneous objection to jury instructions at trial was independent of federal law under Ake. The petitioner argued that the rule was not independent, because under Ohio law the appellate court could overlook the rule for claims involving "plain error", which could include

constitutional error. 209 F.3d at 865-868. The court rejected this argument, however, because under Ohio law "plain error" review is discretionary, and only applies in "exceptional circumstances". Id. Since the state court decision did not give any indication that the court had exercised its discretion to review for plain error, and appeared to have decided the issue solely based on the procedural rule, the court held that the state court decision was independent of federal law under Ake. Id. Relying on Coleman v. Thompson, supra, the court stated that:

> **The Supreme Court...does not find the mere reservation of discretion to review for plain error in exceptional circumstances to constitute an application of federal law.**

209 F.3d at 868. Unlike the Ohio rule at issue in Scott, supra, Arizona's Rule 32.2(a)(3) is neither discretionary nor limited to "exceptional circumstances". Rather, it requires an Arizona court to consider the merits of every post-conviction claim presented and determine whether the claim is of "sufficient constitutional magnitude". Smith, 241 F.3d an at 1196-1197 n.6. If the claim is of "sufficient constitutional magnitude", it must be heard on the merits unless the State can prove the claim was knowingly, intelligently and voluntarily waived. Id. If the claim is not of "sufficient constitutional magnitude", then the claim may be subject to waiver and preclusion, Id Like the "fundamental trial error" procedural rule in Ake, application of Rule 32.2(a)(3) depends upon an "antecedent ruling on federal law" and is not independent of federal law. Ake, supra, 470 U.S. at 75. Contrary to Petitioner's contention, therefore, Scott is not in conflict with the Ninth Circuit's decision in this case.

In Paprocki v. Foltz, 869 F.2d 281 (6th Cir. 1989), a case relied upon by the court in Scott v. Mitchell, supra, the court held that the petitioner's claim, that a self-defense instruction used in his trial was unconstitutional, was subject to procedural default as a result of his failure to object to the instruction at trial, as required by a Michigan procedural rule requiring contemporaneous objection. 869 F.2d at 284-285. The petitioner argued that the claim should not be defaulted, however, because the Michigan Court of Appeals, in denying the claim, reviewed the claim for "manifest injustice", and thereby addressed the merits of the claim and waived the procedural bar. Id. The court rejected this argument, however, holding that under Michigan law, the Court of Appeals' procedural rule on appeal for an unobjected-to claim:

> **was to enforce the procedural bar while reserving the right to excuse it if necessary to prevent manifest injustice.**

869 F.2d at 285, emphasis added. The court held that:

> **[...w]e do not believe that the state court's explanation of why the jury instructions resulted in no manifest injustice can fairly be said to have constituted a waiver of the procedural default.**

Id. Like Scott, supra, the procedural rule at issue in Paprocki did not require the Michigan Court of Appeals to review the merits of the petitioner's claim. Since the error was not objected to, the court could, in its discretion, review the merits of the claim for "manifest injustice". As the court held in Scott, supra, relying on Coleman, supra, the mere reservation of discretion to review for manifest injustice is not a determination of federal law under Ake, 209 F.3d at 868. In this case, however, and as held by the Ninth Circuit, Arizona courts are required to review a post-conviction claim for its "constitutional magnitude" in order to determine whether the claim is precluded under Rule 32.2(a)(3). Thus, the Michigan procedural rule in Paprocki, supra, was independent of federal law under Ake, while Rule 32.2(a)(3) is not independent under Ake.

In Willis v. Aiken, 8 F.3d 556, 559-567 (7th Cir. 1993), the court held that the petitioner's claim that a jury instruction was unconstitutional was procedurally defaulted due to his failure to comply with an Indiana procedural rule requiring a contemporaneous objection at trial. Because there was no objection to the instruction, the Indiana appellate courts were permitted under Indiana law to review the claim only for "fundamental error." Id. at 560. On appeal, the court held that the instruction was not "fundamental error", citing only Indiana law. Id. The petitioner argued in federal habeas that the claim should not be held to be procedurally defaulted, because the state court's "fundamental error" review required a review for constitutional error, and that review was therefore not independent of federal law. The Seventh Circuit rejected this argument, however, because it found that Indiana law does not equate "fundamental error" with "federal constitutional error". Id. at 562-569. Rather, it found that Indiana law mandates review for "fundamental error" only when the denial of a fundamental right "gives rise to a question of fundamental error as defined by state law". Id. at 567, emphasis in original, quoting Gutierrez v. Moriarty, 922 F.2d 1464, 1469 (10th Cir. 1991). The court therefore concluded that the Indiana

appellate court's finding of "no fundamental error" was an independent state ground. Id. Thus, Willis is also distinguishable from this case, as the procedural rule at issue there was discretionary, and did not require a determination of federal law in order to apply the rule. As the Ninth Circuit held in this case, however, application of Rule 32.2(a)(3) requires a determination of the "constitutional magnitude" of a post-conviction claim, and is therefore not independent of federal law. .

Finally, in Gutierrez v. Moriarty, 922 F.2d 1464 (10th Cir. 1991), relied on in Willis v. Aiken, supra, the court held the petitioner's claim that he was entitled to an evidentiary hearing in federal district court on constitutional violations relating to preindictment and pretrial delay was procedurally defaulted due to the petitioner's failure to raise those issues in the state trial court. 922 F.2d at 1468-1472. The New Mexico Supreme Court had held on appeal that the petitioner failed to preserve the claims for appellate review by failing to both raise the issue and offer a "proper quantum of proof" in the trial court. Id. at 1468. In habeas proceedings, petitioner argued that New Mexico has an exception to its waiver rule for claims involving "fundamental error". Id. The petitioner argued that the New Mexico Supreme Court had in fact considered the merits of his claims under this exception, as it referred to "quantum of proof", a substantive issue, and had cited a New Mexico case in which the court had reviewed the merits of a defaulted claim. Id. Petitioner thus argued that New Mexico's "fundamental error" rule was analogous to the "fundamental trial error" rule in Ake v. Oklahoma, supra. Id. The Tenth Circuit rejected this argument, however, as it found from examining New Mexico case law that New Mexico "does not equate fundamental error with federal constitutional error." Id. at 1469. Instead, it found that under New Mexico law a ruling by a state appellate court simply denying a claim, as in petitioner's case, did not "necessarily" mean that the court found no federal constitutional error, and could also mean that the court (i) considered the merits of the claim and found no "fundamental error" as defined under state law, (ii) found a violation of a "fundamental right", which under New Mexico is a "federal constitutional right", but declined to exercise its discretion to review the claim on its merits or (iii) found the error to be "fundamental error" but harmless, and treat the claim as a "fundamental right" claim and subject it to waiver. Id. Thus, the court held that the denial of the claim did not necessarily require a

determination of the merits of a federal constitutional claim, and that New Mexico's procedural rules were, unlike the procedural rule in Ake, independent of federal law. Id. Thus the court held that the New Mexico procedural rule was an independent state ground for the decision and that petitioner's claim was procedurally defaulted. Id. Again, Gutierrez is distinguishable from this case because it involved a procedural rule which was discretionary and did not require a determination of federal law to apply the procedural rule.

For the above reasons, Petitioner's contention that the Sixth, Seventh and Tenth Circuits are in conflict with the Ninth Circuit on the application of Ake v. Oklahoma is incorrect. The Ninth Circuit correctly applied Ake in this case and held that Rule 32.2(a)(3) requires Arizona courts to determine the merits of a post-conviction claim to determine whether it is a claim of "sufficient constitutional magnitude" and whether it is precluded under that rule. Smith, supra, 241 F.3d at 1196-1197. The Ninth Circuit also correctly held that Rule 32.2(a)(3) is not independent of federal law under Ake because a ruling under Rule 32.2(a)(3) "necessarily includes an evaluation of the constitutional stature of the claim" and "does not rest on an independent state ground". Id. at 1196-1197, n.6. As stated above, the Sixth, Seventh and Tenth Circuit cases relied upon by Petitioner are completely distinguishable from this case and Ake, because the state procedural rules in those cases were discretionary in nature, and did not make:

> **'Application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed'.**

Smith. Id. at 1196, quoting Ake, 470 U.S. at 75.

For all of the above reasons, Respondent requests this Court to deny the writ as to Petitioner's first Question Presented For Review.

II

A

The Ninth Circuit Did Not Misinterpret Rule 32.2(a)(3) And Arizona Law In Finding That Application Of The Rule Requires A Determination Of the "Constitutional Magnitude" Of A Post-Conviction Claim.

The Ninth Circuit found, after an examination of Rule 32.2(a)(3), the Comment to that Rule, and case law relating to the Rule,[15] that an Arizona court is required to determine whether a post-conviction claim is of "sufficient constitutional magnitude" in order to determine whether the claim should be heard on the merits or precluded under Rule 32.2(a)(3). Smith v. Stewart, supra, 241 F.3d at 1196-1197. The court explained the Rule as follows:

> **The Arizona Supreme Court's 1992 comment to Rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant knowingly, voluntarily and intelligently waived the claim. Ariz.R.Crim.Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.**

Id. at 1197, n.6. The court thus held that under Rule 32.2(a)(3) claims of "sufficient constitutional magnitude" are an "exception" to preclusion under that Rule. Id. at 1197.

Petitioner contends, however, relying on State v. Espinosa, 29 P.3d 278 (App. 2001), that the Ninth Circuit's analysis of Rule 32.2(a)(3) is erroneous, that the Rule does not contain an exception for claims of "sufficient constitutional magnitude", and that the Rule does not require Arizona courts to determine the "constitutional magnitude" of a claim in order to apply Rule 32.2(a)(3). (Pet. for Cert. at 17-24.) Petitioner contends instead that Rule 32.2(a)(3) contains an exception, not for claims of "sufficient constitutional magnitude", but for a "narrow category of constitutional rights"[16], which are

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[15] See State v. Curtis, 912 P.2d 1341, 1344 (Ariz. App. 1995); State v. French, 7 P.3d 128, 130-131 (Ariz. App. 2000).

[16] Petitioner has placed the phrase "narrow category of constitutional rights" in quotation marks in the Petition, but has not cited what source or authority the phrase comes from. (Pet. for Cert. at 22.) If there is a source for this quoted phrase, Petitioner should provide it to Respondent, since Petitioner is relying on this phrase to support its position.

only those constitutional rights which require a defendant's "personal knowledge" to waive the right, and which the attorney may not waive for the defendant. (Id.) According to Petitioner, therefore, the only claims which are excepted from preclusion under Rule 32.2(a)(3) are those involving the right to counsel, the right to plead not guilty, the right to a trial by jury, and the right to be present at trial, all of which rights can only be waived by the defendant, and not the attorney. (Id.)

Petitioner's interpretation of Rule 32.2(a)(3) is incorrect, and is based entirely upon a misinterpretation of the following sentence in the Comment to the Rule; which Petitioner cites, emphasizes and relies on for its interpretation:

> **[...S]ome issues not raised at trial, on appeal, or in a previous collateral proceeding may be deemed waived without considering the defendant's personal knowledge, unless such knowledge is specifically required to waive the constitutional right involved.**

(Pet. for Cert. at 21, emphasis in original). Based upon this sentence, Petitioner contends that:

> **Read in context, the reference in the Comment to claims of "sufficient constitutional magnitude" does not recognize or establish any general exception to Arizona's rules of preclusion. The Comment merely acknowledges that Arizona's rules of preclusion will not bar a claim involving a narrow category of rights absent an on-the-record personal waiver by the defendant.**

(Id. at 22, emphasis added.) This argument shows that Petitioner has misread the above sentence in the Comment. That sentence does not state, as Petitioner claims, that only constitutional rights requiring a personal waiver by the defendant are excepted from preclusion under Rule 32.2(a)(3). What the sentence actually states that a post-conviction claim which is not of "sufficient constitutional magnitude" may generally be waived by the defendant's counsel without the defendant's knowledge and personal waiver, unless a personal waiver is "specifically required" to waive that specific constitutional right. Petitioner has misread and misconstrued the Comment in contending that all claims except those involving constitutional rights requiring a personal waiver are precluded under Rule 32.2(a)(3). Moreover, Petitioner's construction of the Rule and Comment essentially renders the portion of the Comment referring to claims of "sufficient constitutional magnitude" meaningless and superfluous, and the Rule and Comment may not be interpreted in such a manner. The Ninth Circuit's analysis of Rule 32.2(a)(3) is reasonable and correct, and is supported by the Arizona case law relied upon by the court. See State

v. Curtis, supra, 912 P.2d at 1345 ("A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude" citing Comment). Moreover, even assuming, arguendo, that Petitioner's interpretation is correct, and that only claims involving constitutional rights for which a personal waiver is required are not precluded under Rule 32.2(a)(3), the Rule would still not be independent of federal law under Ake v. Oklahoma, supra. To determine whether a claim was subject to preclusion under Petitioner's interpretation of Rule 32.2(a)(3) an Arizona court would be required to make the following determinations before it could decide whether to hear the claim on the merits or preclude the claim under the rule: (i) whether the claim presented involved the violation of a federal constitutional right, (ii) whether the constitutional right was one which requires personal knowledge and waiver by a defendant and (iii) whether the defendant in fact previously made a personal waiver of the constitutional right. All of the above preliminary determinations would be necessary for an Arizona court to be able to apply preclusion under Rule 32.2(a)(3), and all of these determinations are "antecedent ruling[s] on federal law" on which the application of Rule 32.2(a)(3) depends. Ake, supra, 470 U.S. at 75. Thus, even under Petitioner's reading of Rule 32.2(a)(3) and its Comment, preclusion under Rule 32.2(a)(3) would not constitute an independent state ground for denial of a constitutional claim under that Rule. Ake, supra.

Finally, Petitioner's reliance on State v. Espinosa, supra, a decision of Division Two of the Arizona Court of Appeals, decided after the Ninth Circuit's ruling in this case, is misplaced because that decision conflicts with State v. French, supra, a prior decision of that court. In French, the defendant brought a post-conviction claim of ineffective assistance of counsel based upon his trial counsel's failure to request an alibi instruction. French, supra, 7 P.3d at 129-130. The State argued that the claim was precluded under Rule 32.2(a)(3) because the defendant failed to raise the claim in a previous Rule 32 Petition. Id. The defendant argued, however, based on the Comment to Rule 32.2(a)(3), that his claim was of "sufficient constitutional magnitude" to be heard on the merits and not precluded, and that he had not knowingly, intelligently and voluntarily waived the claim. Id. at 130. Relying on State v. Curtis, supra, a decision of Division One of the Arizona Court of Appeals, the court held that the ineffectiveness

claim was not of "sufficient constitutional magnitude" to avoid the preclusive effect of Rule 32.2(a)(3), and that the defendant had waived the claim by failing to raise it in his prior Rule 32 Petition. Id. at 130-131.[17] In so holding, the court examined the merits of the claim, and found, in essence, that any error was harmless due to the "ample evidence" supporting the conviction. 7 P.3d at 131.[18] Based on its review of the merits of the claim, therefore, the court held that trial counsel's failure to request an alibi instruction was not "so egregious" that it could not be precluded under Rule 32.2(a)(3). Id. at 130.

Thus, State v. French and State v. Curtis both clearly support the Ninth Circuit's conclusion in this case that under Rule 32.2(a)(3), a trial court must examine a post-conviction claim on its merits to determine if it is of "sufficient constitutional magnitude" that it cannot be precluded under that Rule. Inexplicably, however, just over a year after Division Two decided State v. French, it decided State v. Espinosa, supra, which appears to hold that the determination of whether a claim is of "sufficient constitutional magnitude" under the Comment to Rule 32.2(a)(3) is based upon whether the constitutional

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[17] In State v. Curtis, supra, the court held that the defendant's post-conviction claim that an alibi instruction was unconstitutional was not of sufficient constitutional magnitude", within the meaning of that term in the Comment to Rule 32.2(a)(3), and was therefore precluded under that Rule due to his failure to raise it in his appeal and prior Rule 32 Petition. Curtis, 912 P.2d at 1344-1345. The court held that:

> **A claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the "asserted claim is of sufficient constitutional magnitude." Comment to Rule 32.2(a)(3)(Supp. 1994). We need not examine whether the standard alibi instruction could be better worded. At the time of the first appeal, the court not only reviewed the issues petitioner had raised, but also reviewed for fundamental error and found none. This review necessarily extended to the jury instructions. Petitioner's belated focus on the alibi instruction lacks sufficient constitutional magnitude to review an issue that he had two full opportunities to raise before. The trial court properly found this issue precluded by Rule 32.2(a)(3).**

Id. at 1344.

[18] The court relied on the victim's identification of the defendant, and a witness who saw part of the attack on the victim and provided a description of the car and license plate number of the car driven by the perpetrator which matched the defendant's car. 7 P.3d at 131.

right on which the claim is based is a right which must be "personally and expressly waived" by a defendant in order for waiver to occur. Espinosa, 29 P.3d at 280. The court stated that such rights would include the right to a jury trial and right to counsel. Id. Based upon this standard, the court held that the defendant's post-conviction claim that a plea agreement was unconstitutionally withdrawn by the State was not of "sufficient constitutional magnitude" to avoid preclusion because it was not:

> **such "'an inherently personal right of fundamental importance'" that it must be personally and expressly waived.**

Id. citing State v. Smith, 4 P.3d 388, 393 (Ariz. App. 1999) quoting Winters v. Cook, 489 F.2d 174, 178 (5th Cir. 1973).

Contrary to Petitioner's contention, State v. Espinosa is not a valid basis for questioning the decision of the Ninth Circuit in this case. First, and for the reasons stated previously, Espinosa's reading of Rule 32.2(a)(3) and its Comment is unreasonable and incorrect, as there is nothing in either Rule 32.2(a)(3) or its Comment which supports its conclusion that the standard for preclusion under Rule 32.2(a)(3) is whether a constitutional right can be personally waived. Second, Espinosa does not even mention, much less follow, State v. Curtis, and State v. French, supra, the latter of which was a case from its own Division, and relies on cases which have nothing to do with preclusion. A decision concerning a state procedural rule which disregards and ignores prior relevant and applicable case law concerning the rule cannot be used as a basis for a procedural default, as procedural default can only be justified when the State court correctly follows an established state procedural rule which is consistently and regularly applied and enforced. Rule 32.2(a)(3), as unreasonably and incorrectly interpreted by State v. Espinosa, is not the procedural rule applicable to this case. Rule 32.2(a)(3), as explained in its Comment, State v. Curtis and State v. French, is the applicable state procedural rule here, and the Ninth Circuit correctly based its decision on that Rule. State v. Espinosa did not establish a procedural rule. It simply failed to follow the procedural rule existing at the time of the decision, and therefore cannot be the basis for a procedural default. Finally, and as stated previously, even if Espinosa were the standard for preclusion under Rule 32.2(a)(3), that would not change the result in this case, as an Arizona court would still be required to make an "antecedent ruling on federal law" in order to apply Rule 32.2(a)(3),

32.2(a)(3), and that Rule would therefore still not constitute an independent state ground under Ake. For all of the above reasons, Petitioner's contention that State v. Espinosa is applicable to this issue is incorrect.

B

The Ninth Circuit Correctly Held That The Arizona Courts Did Not Clearly And Explicitly Rely On A Procedural Bar In Denying Respondent's Ineffectiveness Claim, And That There Was Therefore No Independent State Ground For Denial Of The Claim

In addition to holding that Rule 32.2(a)(3) itself was not an "independent state procedural rule" under Ake, and therefore not an independent state ground for the denial of Respondent's ineffectiveness claim, the Ninth Circuit alternatively held that the Arizona trial court's ruling on the claim was not an independent state ground, because in that ruling the court did not "clearly and explicitly" rely on a state procedural rule in denying the claim. Smith, supra, 241 F.3d at 1197. Petitioner contends, however, that the Arizona trial court clearly relied on a procedural bar in its ruling denying the claim, and that the Ninth Circuit erred in holding therefore that the ruling was not an independent state ground for the denial of Respondent's claim. (Pet. for Cert. at 15-16.) Petitioner's contention is incorrect for two reasons.

First, it is not necessary to determine whether the Arizona court relied on a procedural bar in its ruling. As stated previously, if a state procedural rule is not independent of federal law, then a court's ruling based on that Rule can never be independent of federal law assuming that the state court follows the rule, which it must. It was for this reason that this Court held in Ake v. Oklahoma that there was no independent state ground for the Oklahoma court's denial of Ake's claim, "[d]espite the court's state-law ruling", because under the rule the "state court must rule, explicitly or implicitly, on the merits of the constitutional question." Ake, supra, 470 U.S. at 74-75, emphasis added. Thus, since Rule 32.2(a)(3) is not independent of federal law, and since we must assume that the Arizona courts followed that Rule in this case, the trial court's ruling denying Respondent's ineffectiveness claim could never be an independent state ground. Based on Ake it is therefore unnecessary to determine whether the court relied on a procedural bar in its ruling denying the claim.

Second, the Order does not contain an independent state ground under the principles of Coleman, Harris, Long, and Caldwell, supra. The Ninth Circuit correctly held that it was "unclear" from the trial court's last order denying Respondent's claim[19] whether the court was invoking a procedural bar. 243 F.3d at 1195-1197. The Order does not cite Rule 32.2(a)(3) or any of its provisions. (App. H.) Moreover, any procedural ruling is "interwoven " with federal law. Long, supra, 463 U.S. at 1040-1041. The text of the ruling rejects Respondent's argument that the attorneys of the Pima County Public Defender intentionally stayed on the case so that they would not have to allege that one of their attorneys was ineffective. (Appendix H.) Based on this premise, the court's ruling, in essence, was that if Respondent had a colorable claim of ineffectiveness his counsel would have withdrawn from the case so that he could raise it. (Id.) Thus, the gist of the ruling is that Respondent does not have a colorable claim of ineffective assistance of counsel. (Id.) The ruling is therefore really a ruling denying Respondent's constitutional claim on the merits. To the extent that any procedural aspects of the case are discussed in the ruling, they are thoroughly "interwoven" with the merits issue of whether Respondent received ineffective assistance of counsel. Long, supra. Since any procedural issue is interwoven with the substantive claim of ineffectiveness, the presumption of Long, Caldwell, Harris and Coleman applies, and it must be presumed that there is no independent state ground for the decision. Since the presumption of "no independent state ground" applies, then the "plain statement" rule applies and the court must find that the ruling is not an independent state ground in the absence of a "plain statement" in the text of the ruling clearly and ambiguously relying on an independent state procedural rule. As stated above, the ruling does not state that the claim is precluded, and does not cite Rule 32.2(a)(3) or any other preclusion or waiver rule. In the absence of a plain statement in the ruling clearly and ambiguously relying on a state procedural rule to deny relief, there is no independent state ground for the Arizona courts denial of Respondent's claim, and the Ninth Circuit correctly held that the claim was not

[19] It is the last reasoned state court decision denying a claim which must be examined in order to determine whether the denial of a claim was based on an independent state ground. Ylst v. Nunnemaker, supra, 501 U.S. at 802-803. Petitioner erroneously focuses on the trial court's first order denying the claim in contending that the trial court relied on a procedural bar.

procedurally defaulted. Id. Petitioner's contention that the Ninth Circuit erred in finding that the state court's ruling on the ineffectiveness claim did not procedurally bar this claim from habeas review is therefore incorrect. Id.

C

The Ninth Circuit Did Not Err In Refusing To Certify A Question Of Arizona Law To The Arizona Supreme Court.

Finally, Petitioner contends that the Ninth Circuit erred in refusing to certify a question of law to the Arizona Supreme Court concerning "any ambiguity or confusion over the meaning of Rule 32.2(a)(3)." (Pet. for Cert. at 25-27.) Petitioner's contention is incorrect. There may be some habeas cases where state law relevant to the case is so unclear or undefined that the certification of a state law question to the state court is necessary in order for constitutional claims to be decided. This case, however, is not one of those cases. The Ninth Circuit in this case examined Rule 32.2(a)(3), its Comment, and Arizona case law relevant to the rule and concluded that the Rule requires an Arizona court to determine whether the claim is of "sufficient constitutional magnitude" to be heard on the merits in post-conviction proceedings and not precluded under the Rule. This conclusion was reasonable and correct. Petitioner does not agree with this conclusion, however, and has reached the opposite conclusion i.e., that an Arizona court is not required to determine whether a claim is of "sufficient constitutional magnitude" in order to apply Rule 32.2(a)(3). Petitioner now requests that a certified question be presented to the Arizona Supreme Court concerning Rule 32.2(a)(3) and that the court's decision on the certified question become the law of this case. Respondent requests this Court to deny this request. Rule 32.2(a)(3) and the Comment to the Rule were issued by the Arizona Supreme Court and it was clear to the Ninth Circuit from the Rule and the Comment that the "constitutional magnitude" of a claim must be determined in order to apply Rule 32.2(a)(3). There is therefore no need for a certified question, as the Ninth Circuit, pursuant to its authority in habeas cases, had addressed the issue and reached a reasonable and correct conclusion concerning Rule 32.2(a)(3). Respondent therefore requests this Court to deny Petitioner's request to have a question certified to the Arizona Supreme Court on the meaning of Rule 32.2(a)(3).

III

Petitioner's Procedural Default Arguments In This Case Contradict The Claim It Is Making In Other Cases That It Has "Opted In" To Chapter 154 of the AEDPA, Which Contains A Statutory Default Rule Under Which Respondent Is Clearly Entitled To Review Of His Federal Constitutional Claims.

Prior to the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA"), the rule of procedural default in habeas corpus cases was "exclusively a matter of federal common law." Ortiz v. Stewart, 149 F.3d 923, 931 (9th Cir. 1998), cert. denied 526 U.S. 1123 (1999). See Wainwright v. Sykes, supra, 433 U.S. at 72, 100 n.2 (dissenting opinion of Justice Brennan).[20] "Chapter 154 of AEDPA codified a new default rule, applicable only to states that `establish a mechanism for the appointment, compensation, and payment of reasonable litigation expenses of competent counsel in State post-conviction proceedings brought by indigent prisoners whose capital convictions and sentences have ... become final for State law purposes.' 28 U.S.C. § 2261(b)". Ortiz, 149 F.3d at 931. The AEDPA default rule is set forth in 28 U.S.C. § 2264.

Respondent argued below through an Amicus Brief that the enactment of the AEDPA, and Petitioner's contention that it had "opted in" to AEDPA's Chapter 154, made Petitioner's arguments regarding common law procedural default inapplicable. Instead, Respondent argued, his entitlement to federal review should be measured by the standards of 28 U.S.C. § 2264. Ibid. Petitioner filed an Answering Brief opposing this argument. Under that section, Respondent is plainly entitled to federal review of his ineffective assistance claims, without regard to how, or even whether, those claims were raised in state court. That is because § 2264(a) allows federal review of claims never presented to state court, where "the failure to raise the claim is ... the result of State action in violation of the Constitution or laws of the United States ...." 28 U.S.C. § 2264(a) (emphasis added). Chapter 154 of the AEDPA itself is, of course, a "law of the United States," and one of its provisions is 28 U.S.C. §2261(d), which

[20]From the time of its creation, it has been clear that the doctrine of procedural default is subject to amendment by Congress. See Wainwright v. Sykes, 433 U.S. 72, 100 n.2 (1977) (dissenting opinion of Justice Brennan).

provides:

> **No counsel appointed pursuant to subsections (b) and (c) to represent a State prisoner under capital sentence shall have previously represented the prisoner at trial or on direct appeal in the case for which the appointment is made unless the prisoner and counsel expressly request continued representation.**

That provision, and §2261's other requirements for state post-conviction proceedings, were not followed in Respondent's case, as the same office that represented him at trial and an appeal represented him in state and federal post-conviction proceedings, and that resulted directly in the failure to challenge the effectiveness of trial counsel that is at issue here. Since Petitioner claims the benefits of Chapter 154, its failure to follow that provision in Respondent's case violated federal law. See Mississippi Protection and Advocacy System, Inc. v. Cotten, 929 F.2d 1054 (5th Cir. 1991)(where a state accepts federal benefits provided under specified conditions, state rules and regulations which violate those conditions are violative of federal law and invalid).

The Court of Appeals did not address this issue, presumably because it was bound by Circuit precedent holding that common law procedural default continued to apply in Arizona "[b]ecause Arizona ha[d] not finalized its procedures with respect to the appointment and compensation of counsel in post-conviction relief proceedings" and therefore was "not governed by Chapter 154." Ortiz v. Stewart, 149 F.3d at 931. However, on September 24, 2001, Petitioner prevailed in its argument to the Ninth Circuit that it has now "opted in" to Chapter 154. Spears v. Stewart, 2001 WL 111968 (9th Cir. filed September 24, 2001.)

That decision effectively moots the questions Petitioner is seeking to have reviewed in this case. At the least, if the decision in Spears stands, it means that any decision in this case will have little if any impact on future Arizona capital cases, which will be governed by §2264 rather than Sykes. In fact, Respondent would submit that it renders the common law default issues irrelevant in his case as well, because by its terms Chapter 154 applies to all cases involving capital sentences from a given state, or none: its applicability turns on whether "a State [has] establishe[d] by statute, rule of its court of last resort, or by another agency authorized by State law, a mechanism for [providing] .... competent counsel

in State post-conviction proceedings" which is available "to all State prisoners under capital sentence ...." 28 U.S.C. § 2261(b) and (c) (emphasis added). A "mechanism" cannot be created, or function, only in a given case.

Nor can a State litigant properly make arguments regarding the nature and application of its laws in one case, and contrary arguments in another. See Russell v. Rolfs, 893 F.2d 1033, 1037 (9th Cir.1990), cert. denied, 501 U.S. 1260 (1991). Arizona cannot have it both ways. It has long claimed to have the "mechanism" required by Chapter 154 in place, and to apply it to "all State prisoners under capital sentence." It has now prevailed on that claim in the Court of Appeals in Spears, supra, entitling it to "special rules favorable to the state party, but applicable only if the State meets certain conditions, including provision for appointment of post-conviction counsel in state proceedings." Lindh v. Murphy, 521 U.S. 320, 327 (1997). One of those rules is the default rule of 28 U.S.C. § 2261. Having invoked its benefits, Petitioner should be held to the terms of that rule, which make its arguments here moot and which separately entitle Petitioner to review of the merits of his federal constitutional claims.

CONCLUSION

For all of the foregoing reasons, Respondent requests this Court to deny the Writ.

RESPECTFULLY SUBMITTED this 26th day of September, 2001.

S. JONATHAN YOUNG
Attorney for Respondent

for ROBERT J. HIRSH
Attorney for Respondent

DATED: September 26, 2001

APPENDIX A

Smith v. Stewart, 241 F.3d 1191 (9th Cir. 2001)

APPENDIX A

[Filed March 6, 2001]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT DOUGLAS SMITH Petitioner-Appellant,	)	
v.	)	
TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	)	Nos. 96-99025, 96-99026 D.C. No. CV-87-234-TUC-RMB
	)	OPINION

Appeal from the United States District Court for the District of Arizona;
Richard M. Bilby, Chief Judge, Presiding. D.C. No. CV-87-234-TUC-RMB.

Argued and Submitted August 17, 2000 -- Pasadena, California

Before: WARREN J. FERGUSON, STEPHEN REINHARDT, DAVID R. THOMPSON, Circuit Judges.

COUNSEL

S. Jonathan Young, Tucson, Arizona; John F. Palumbo, Law Offices Pima County Public Defender, Tucson, Arizona, for the petitioner-appellant.

Scott Bales, Solicitor General, Phoenix, Arizona, for the respondent-appellee.

FERGUSON, Circuit Judge:

Robert Douglas Smith ("Smith") appeals from the district court's dismissal of his habeas corpus petition on the ground of procedural default. He claims that his trial counsel failed to investigate his mental condition or to present adequate mitigating testimony during the sentencing phase of his trial, despite clear indications at the time of the presence of a mental disorder. We reverse the district court's ruling that federal habeas review is barred. Because Smith has made a colorable claim to relief, we order an evidentiary hearing in the district court.

I.

In March of 1982, Smith and accomplice Joe Leonard Lambright were convicted of sexual assault, kidnaping, and first-degree murder. [FN1] The principal witness against them at trial was another accomplice, Kathy Foreman ("Foreman"), who exchanged her testimony on the Government's behalf for freedom from prosecution.

FN1. Because the facts of the offense are set forth in our en banc opinion, we do not repeat them here. *See Lambright v. Stewart*, 191 F.3d 1181, 1182-83 (9th Cir.1999) (en banc).

After the guilt phase of Smith's trial, the prosecution sought the death penalty on the theory that the murder had been committed in an especially heinous, cruel, or depraved manner under Ariz.Rev.Stat. Ann. § 13–703(F)(6). The government called Smith's former cellmate to the stand who, in seeking to reduce his own sentence, had told a criminal investigator that Smith laughed while fully confessing to the crime. When the government next called the investigator to testify about the conversation, she confirmed that Smith had described the crime to his cell-mate in exceptional detail, showed no remorse, and snickered throughout. In addition to presenting testimonial evidence, the prosecution displayed photographs of how the crime scene looked at night and during the day so that the court could fully grasp the victim's terror before she died.

Smith's counsel took less than a day to present the mitigating evidence he had gathered in support of sparing his client's life. Despite obvious indications that his client suffered from a mental disorder, the lawyer neither obtained nor presented any evidence of his psychiatric history and continuing mental impairment. He also failed to collect or present records relating to Smith's horrific childhood. Instead, his evidence consisted entirely of the testimony of Smith's mother-in-law and two sisters. Each witness was brief. Each offered only a general characterization of Smith as a nice and generous person who, along with his sisters, had grown up in an unstable household.

In closing argument, Smith's lawyer offered the court some reasons not to impose the death penalty. He opened by saying, "[f]irst of all, the most mitigating factor in the case is the fact that Kathy Foreman wasn't prosecuted at all." He made passing reference to Smith's "abusive childhood." Apparently believing that evidence of Smith's mental disorder might constitute a justification for the death penalty, the lawyer asserted:

> I'm told today by Jim Meyers there is a report from the hospital in Houston, which I haven't seen yet.... The reports I have are that he has problems with depression. He is a person of average intelligence. I don't know, and I'm making the statements on the reports I have seen so far, I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated.

***1194** Next, he asked the court to consider the *victim's family's* "great loss" in deciding Smith's punishment. He returned again to the government's failure to prosecute Foreman, spoke abstractly of his personal opposition to the death penalty, and promptly closed by saying, "[f]inally, again, I question how the Court could agree with the government, which is asking for the death penalty for Robert Smith, when it was the same government agency that chose to let Kat Foreman go without any prosecution at all... I don't think that's justice."

The state trial judge sentenced Smith to death. He rejected the lawyer's argument that Foreman's treatment at the government's hands warranted a lesser sentence for Smith because he did not "believe that any of the ramifications of her grant of immunity have diminished the moral, legal or ethical culpability or responsibility of either Mr. Smith or Mr. Lambright by any degree whatsoever." He justified his decision to impose death by stressing that, "I have, in fact, searched the record, the file, the pre-sentence report, my trial notes and recollections for any and all other factors which might conceivably mitigate your culpability for offenses of kidnaping and sexual assault and found none."

II.

The same office that represented Smith at trial continued to represent him unsuccessfully on appeal and in post-conviction proceedings. On direct appeal, the Arizona Supreme Court affirmed both Smith's conviction and sentence. *See State v. Smith*, 138 Ariz. 79, 673 P.2d 17 (Ariz.1983). Smith's counsel then filed a series of state and federal post-conviction petitions, none of which included an ineffective assistance of counsel claim, and all of which were denied.

After exhausting available state remedies, Smith's lawyer filed an amended federal petition for writ of habeas corpus. Soon after, District Judge Bilby received a letter from Smith himself, complaining that he had instructed his lawyer to raise a claim of ineffective assistance of counsel, but that his lawyer had failed to do so. In the letter, Smith wrote:

> My attorney says he can't rais[sic] or file the issue of enafective [sic] assistants [sic] of countsaling [sic] cause he is empoleed [sic] by the same office as the attorney that handeled [sic] my trial. I'm under the inpresstion [sic] from him that if all the issue [sic] is denied, that I could then get the courts to apoint [sic] me another attorney to file this issue for me, IS THIS TRUE? To my understandig [sic] from everyone I've ask [sic], wrote [sic] to tells [sic] me diffrant [sic] things. I've written Denise Young and ask [sic her about this, it took her a long time

to respond cause she's so bissy [sic] and still did'nt [sic] answer my questions [sic]. Sorry to have to bother you with this but I feel this is a very inportant [sic] issue, Is'nt [sic] it also true that all issues has [sic] to be rased [sic] and filed at one time acording [sic] to the new apeals [sic] law passed a cuppall [sic] of year [sic] ago? I would like this court to know that I want this issue inclouded [sic] in my apeals [sic]. I would like take this to [sic] time to respectfuly [sic] ask this Honorable Court to apoint [sic] me a new FEDERAL ATTORNEY to work with my attorney Mr. John F. Palumbo at the PIMA COUNTY PUBLIC DEFENDERS OFFICE TUCSON AZ. if this is possible, if not, please apoint [sic] me new Federal Apeal [sic] ATTORNEYS. THANK YOU! very much for your concederation [sic], time and help with this matter.

Smith's counsel confirmed in an affidavit to the court that the cla had not been raised because his employer, a state agency, prohibited lawyers from attacking each other's performance as a matter of polic

In response to Smith's letter, the district court appointed a lawyer private practice to litigate his claim of ineffective assistance of tri counsel. Smith then filed a state post-conviction petition alleging f the first time several instances of ineffective assistance at trial ar sentencing, which the court dismissed as procedurally ***1195** barre The federal district court also refused to adjudicate Smith's ineffectiv assistance of counsel claim on the ground that "the [state] trial cou found the claims precluded as a matter of state law."

III.

[1] We review de novo a district court's decision to deny a petition fo writ of habeas corpus. *See Mayfield v. Calderon*, 229 F.3d 895, 200 WL 1514610, at * 4 (9th Cir. October 13, 2000).

BEST AVAILABLE

IV.

Smith raised an ineffective assistance of counsel claim for the first time in his third state post-conviction petition. The state court dismissed the claim in October of 1995. Two months later, the state court revisited Smith's claim in an order denying his motion for reconsideration. In the order, the court wrote:

> Counsel's assertion on page 4, line 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed ... to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith" is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client in an appellate matter from ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.
>
> It is HEREBY ORDERED Defendant's Motion for Rehearing is denied.
>
> The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are

summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

[2][3][4] We must determine whether the state court judgment in Smith's case bars federal review of his Sixth Amendment claim. *See Coleman v. Thompson*, 501 U.S. 722, 736, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). A state court's procedural ruling will bar our review only if its basis is separate and distinct from the federal question. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991); *see also Coleman*, 501 U.S. at 729–30, 111 S.Ct. 2546. [FN2] The State contends that the Arizona court's procedural default ruling in this case constitutes an independent state ground that bars us from reviewing Smith's ineffectiveness claim. [FN3]

FN2. To bar our review, a state's procedural default rule must also be adequate, which means that it is "strictly or regularly" followed. See *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988); *see also Hathorn v. Lovorn*, 457 U.S. 255, 263, 102 S.Ct. 2421, 72 L.Ed.2d 824 (1982). We have held that Arizona's procedural default rule is regularly followed in several cases. *See, e.g., Ortiz v. Stewart*, 149 F.3d 923, 931–32 (9th Cir.1998); *Poland v. Stewart*, 117 F.3d 1094, 1106 (9th Cir.1997).

FN3. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Because we conclude that the state court's ruling did not rest on an independent state ground, we do not address Smith's argument that the policy preventing employees from attacking the competency of any of the agency's lawyers constitutes cause

because it was an "objective factor" that was "external" to the petitioner and that "cannot fairly be attributed to him." *Id.*, 501 U.S. at 753, 111 S.Ct. 2546. We note however, that his argument appears to have merit under our recent decision in *Manning v. Foster*, 224 F.3d 1129, 1134 (9th Cir.2000), where we held that "a conflict of interest, independent of a claim of ineffective assistance of counsel ... constitute[s] cause where the conflict caused the attorney to interfere with the petitioner's right to pursue his habeas claim."

*1196 In *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), the Supreme Court held that when a state's procedural default rule depends on an assessment of a federal claim, federal review is not barred. The state court in that case explicitly held that Ake had waived his federal constitutional claim by omitting it from his motion or a new trial. *Id.* at 74, 105 S.Ct. 1087. That court had ruled in another state case, however, that the waiver rule did not apply in cases of fundamental trial error. *Id.* By creating such an exception, "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." The Supreme Court concluded that because "resolution of the state procedural law question depends on a federal constitutional ruling, the state- law prong of the court's holding is not independent of federal law, and our jurisdiction is not precluded." *Id.* at 75, 105 S.Ct. 1087.

We have similarly held that federal habeas review is not barred when a state makes the application of its default rule depend on a consideration of federal law. *See, e.g., Park v. California*, 202 F.3d 1146 (9th Cir.2000), *cert. denied*, — U.S. —, 121 S.Ct. 277, 148 L.Ed.2d 202 (2000); *McKenna v. McDaniel*, 65 F.3d 1483 (9th Cir.1995); *Russell v. Rolfs*, 893 F.2d 1033, 1035–36 (9th Cir.1990). In *Park*, 202 F.3d at 1149, the state court refused to consider the petitioner's federal constitutional claim because he had failed to raise it on direct appeal. Despite the state court's explicit reliance on procedural default in its ruling, we held that Park's federal claim was cognizable in federal habeas corpus proceedings because the California

Supreme Court had held in another case that a petitioner could overcome the procedural bar if he could show a violation of "fundamental constitutional rights." Id. at 1152. As we explained, "in light of [the California Supreme Court's] acknowledgment that the constitutional error exception encompassed consideration by the court of the merits of federal constitutional questions, the California Supreme Court necessarily made an antecedent ruling on federal law before applying the [procedural] bar to any federal constitutional claims raised in Park's state habeas petition." *Id.* at 1153.

We also held in *McKenna v. McDaniel*, 65 F.3d at 1489, that a state court judgment explicitly invoking Nevada's procedural default rule as the basis for dismissing a post-conviction petition did not preclude federal review because the state court had explained in another case that it enjoyed the discretion to address errors of "constitutional dimension." We concluded that the existence of a discretionary exception in cases of constitutional dimension rendered the court's state-law procedural ruling "necessarily intertwined with its analysis of the merits of McKenna's constitutional claims and does not constitute a clear statement of independent and adequate state grounds for the decision." *Id.* at 1489.

It is unclear from the order denying rehearing of Smith's ineffective assistance of counsel claim whether the court invoked a procedural bar as the basis of its ruling. ***1197** The court suggested that Smith's lawyer would have raised an ineffective assistance of counsel claim if Smith had a colorable one. In other words, the court implied that the record failed to demonstrate that Smith had a colorable claim of ineffective assistance of counsel. Such a holding does not satisfy the requirement that a state court clearly and explicitly invoke a state procedural rule to bar federal habeas review.

Moreover, it is clear at the time of the state's procedural ruling, Arizona courts were required to consider the merits of a claim. Ariz. R.Crim. Pro. 32.2(a) generally bars a defendant from obtaining relief from his conviction on a ground that he waived at trial, on appeal, or in any previous collateral proceeding. [FN4] At the time of the state

court's procedural ruling, however, Arizona courts were required to examine the nature of a claim to determine whether the state's procedural default rule applied. *See State v. Curtis*, 185 Ariz. 112, 912 P.2d 1341, 1344 (Ct.App.1995); *see also State v. French*, 198 Ariz. 119, 7 P.3d 128, 130 (Ct.App.2000). Under Arizona's procedural default rule, "[a] claim is precluded that could have been, but was not, raised in a prior appeal or PCR, unless the asserted claim is of sufficient constitutional magnitude." *Curtis*, 912 P.2d at 1344 (internal quotation marks omitted). [FN5] Thus, Rule 32.2's procedural default rule applies where a petitioner's "belated focus" on an alleged error "lacks sufficient constitutional magnitude to revive an issue." *Id.* at 1344. [FN6]

FN4. Since 1992, Rule 32.2 provides, in pertinent part:
a. Preclusion. A defendant shall be precluded from relief under this rule based upon any ground:
(1) Still raisable on direct appeal under Rule 31 or on post-trial motion under Rule 24;
(2) Finally adjudicated on the merits on appeal or in any previous collateral proceeding;
(3) That has been waived at trial, on appeal, or in any previous collateral proceeding.

FN5. Arizona's exception for overcoming procedural default in cases of constitutional dimension or egregiousness remains in effect. *See French*, 7 P.3d at 131 (applying the procedural default rule to petitioner's ineffectiveness claim because "[n]one of these omissions constitutes ineffectiveness so egregious and of such constitutional dimensions that it may not be precluded")

FN6. The Arizona Supreme Court's 1992 comment to rule 32.2(a)(3) makes clear that the application of the amended procedural default rule requires a separate examination of a claim's constitutional magnitude. The comment provides, in pertinent part, that "[i]f an asserted claim is of sufficient constitutional magnitude, the state must show that the defendant

'knowingly, voluntarily and intelligently' waived the claim." Ariz. R.Crim. Pro. 32.2(a)(3) comment (West 2000). Thus, since 1992, Arizona's procedural default rule applies in two circumstances: first, when a claim is of insufficient constitutional magnitude and was forfeited at trial, on appeal, or in any previous proceeding; second, when a claim is of sufficient constitutional magnitude and the State proves that the person seeking relief knowingly, voluntarily, and intelligently waived it at trial, on appeal, or in any previous proceeding. In both cases, the state court must consider the nature of the claim before finding that the petitioner procedurally defaulted it. Because an Arizona procedural ruling in this context necessarily includes an evaluation of the constitutional stature of the claim, it does not rest on an independent state ground.

Given Arizona's exception for errors of "constitutional magnitude," the state court's finding of procedural default in Smith's case necessarily included an evaluation of the strength of his federal claim. Indeed, like the procedural rulings in *Ake*, *Park*, and *McKenna*, the state court's procedural ruling in this case was necessarily intertwined with its implicit determination that the merits of his claim were of insufficient constitutional magnitude. Thus, federal review is not barred.

V.

[5][6] Smith contends that he is entitled to an evidentiary hearing to develop his ineffective assistance of counsel claim. "In a capital case, a habeas petitioner who asserts a colorable claim to relief, and who ***1198** has never been given the opportunity to develop a factual record on that claim, is entitled to an evidentiary hearing in federal court." *Siripongs v. Calderon*, 35 F.3d 1308, 1310 (9th Cir.1994). [FN7] No court has given Smith an opportunity to develop a factual record on his Sixth Amendment claim.

FN7. In *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-9, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992), the Supreme Court held that petitioners must show cause and prejudice for failing to develop

the material facts relating to a claim of ineffective assistance of counsel in state court. In his third Rule 32 petition, Smith attempted to develop the theory that his counsel provided ineffective assistance at sentencing. The court refused, however, to appoint a psychological expert to assist Smith in developing his argument. Despite Smith's attempt to have the court "consider his allegations of ineffective assistance," the court dismissed the claims without a hearing. Under these circumstances, Smith has satisfied the cause prong of *Tamayo-Reyes*. *See Jones v. Wood*, 114 F.3d 1002, 1012 (9th Cir.1997). The prejudice prong of *Tamayo-Reyes* is "coextensive with the prejudice prong of *Strickland*." *Correll*, 137 F.3d at 1414. For the reasons set forth below, we find that Smith has made a colorable claim of prejudice, and is therefore entitled to an evidentiary hearing on this question.

[7][8] To establish that his counsel was ineffective at sentencing, Smith must satisfy the standard the Supreme Court announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Under *Strickland*, he must show that his counsel's performance was deficient; that is, that it was "outside the wide range of professionally competent assistance." *Id.* at 690, 104 S.Ct. 2052. Although there is a strong presumption that an attorney's conduct meets the standard for effectiveness, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691, 104 S. Ct. 2052. In addition to demonstrating counsel's deficient performance, a petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," where a reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* at 694, 104 S.Ct. 2052; *see also Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 1511-12, 146 L.Ed.2d 389 (2000).

[9] "It is imperative that all relevant mitigating information be unearthed for consideration at the capital sentencing phase." *Caro v. Calderon*, 165 F.3d 1223, 1227 (9th Cir.1999), *cert. denied*, 527 U.S.

1049, 119 S.Ct. 2414, 144 L.Ed.2d 811 (1999). As the Supreme Court recently made clear, counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *See Williams*, 120 S.Ct. at 1513-15 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation); *see also Smith v. Stewart*, 189 F.3d 1004, 1008-09 (9th Cir.1999), *cert. denied*, — U.S. —, 121 S.Ct. 358, 148 L.Ed.2d 288 (2000) (No. 00-110); *Caro*, 165 F.3d at 1225; *Bean v. Calderon*, 163 F.3d 1073, 1080-81 (9th Cir.1998), *cert. denied*, 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *Correll v. Stewart*, 137 F.3d 1404, 1412 (9th Cir.1998), *cert. denied*, 525 U.S. 996, 119 S.Ct. 465, 142 L.Ed.2d 418 (1998).

There can be no doubt that Smith has asserted a colorable claim to relief entitling him to an evidentiary hearing. Smith alleges that his lawyer failed to investigate, let alone present evidence of, his miserable childhood, mental disabilities, and mental impairment at the time of the offense. The thin transcript of Smith's sentencing hearing reveals that his lawyer offered only the brief testimony of three lay witnesses who gave merely a vague description of his personality and childhood. When the time came to argue to the court that Smith's life was worth sparing, his lawyer asserted that the best mitigating factor in the case was Foreman's immunity agreement. Inexplicably, he also suggested that the court consider "how *1199 Sandra Owen's [the victim] family has sustained a great loss" in deciding whether Smith deserved to be put to death. The lawyer then offered a rambling explanation of his moral opposition to the death penalty and promptly returned to the State's failure to prosecute Foreman. This was a woefully inadequate presentation in support of saving Smith from a sentence of death.

If Smith's allegations are true, his counsel's failure to conduct any investigation is particularly egregious in light of indications at the time of trial of the presence of a mental disability. We have explained that, "where counsel is on notice that his client may be mentally impaired, counsel's failure to investigate his client's mental condition as a mitigating factor in a penalty phase hearing, without a supporting

strategic reason, constitutes deficient performance." *Hendricks v. Calderon*, 70 F.3d 1032, 1043 (9th Cir.1995); *see also Smith v. Stewart*, 140 F.3d 1263, 1269 (9th Cir.1998) (concluding that counsel was deficient for failing to "perform any real investigation into mitigating circumstances, even though that evidence was rather near the surface"), *cert. denied*, 525 U.S. 929, 119 S.Ct. 336, 142 L.Ed.2d 277 (1998). This appears to be the case here. In a report assessing Smith's competency to stand trial, for example, Dr. Martin Levy noted that he had been hospitalized in a psychiatric unit and opined that, "Mr. Smith does have a history of psychiatric difficulties. Those difficulties have been primarily depressive in nature and have involved suicide attempts." Another report examining Smith's competency described him as "significantly anxious and depressed" and recommended further psychiatric evaluation.

The presentence report similarly signaled that Smith might have a mental disability. It noted that, as a child, Smith suffered from polio, a disease which can cause brain damage, and later underwent psychiatric treatment at a youth community mental health agency. It described Smith's numerous attempts to run away from his family beginning at age nine and his history of impulsive behavior. The report also revealed that Smith had used broken glass to cut through his skin and slash his veins in just one of several attempts to end his life. On another occasion, he shot himself in the stomach. Eventually, Smith began to abuse drugs, including LSD, marijuana, cocaine, psilocybin, heroin, PCP, and amphetamines. In conclusion, the report urged the court that, "[m]ental health counseling should be made available in the prison setting, keeping in mind that the defendant seems to be a high suicide risk." Rather than pursue an investigation, Smith's lawyers allegedly failed to develop any of this evidence, and in fact failed to either present argument relating to it or connecting it to any of Arizona's enumerated mitigating factors. We have previously found that the failure to present any argument based on a presentence report remarkably similar to the one in this case constituted deficient performance. *Smith*, 140 F.3d at 1269.

Smith alleges that his counsel would have uncovered substantial mitigating evidence if he had conducted an investigation. Smith has an IQ of 71, which is in the range of mental retardation. In a report prepared just two years after trial, moreover, Dr. David Gurland wrote that, "[i]n reviewing the data with regards to Mr. Smith, it becomes obvious that this is a man who is a marginally functioning individual who has been ever since his childhood." He noted that Smith was raised in a broken home and suffered both psychological and physical abuse. In commenting on his withdrawal from school in the eighth grade, Dr. Gurland wrote that, "[i]t is hard to know just how he managed to stay in school as long as he did." Smith's low I.Q. makes him "more of a follower than a leader. He is also easily influenced by others whom he may feel like him or admire him or want to be with him." Dr. Gurland concluded that the "patient should not, under the law, be given the death penalty as I think there are enough mitigating circumstances to, at worst, give him a life sentence." In addition to presenting ***1200** evidence that he suffered from a mental disorder, Smith also recounted to the district court that four inmates in a county jail took turns gang raping him when he was just eighteen years old. Smith's lawyer presented none of this powerful and potentially life-saving evidence at sentencing.

[10] Apart from allegedly failing to conduct any investigation into Smith's social and mental history, it appears from the transcript that his lawyer also failed to research the law on capital sentencing. In Arizona, a psychological disorder is a specifically enumerated mitigating circumstance. Ariz.Rev.Stat. § 13-703(G)(1). But when a report hinting at a possible mental impairment surfaced, Smith's lawyer minimized his client's mental disability and told the court, "I would suggest that he doesn't have any major personality disorders and that he is not the type of person that needs to be, quote, eliminated." It appears from this assertion that Smith's lawyer not only failed to recognize that a mental impairment could be mitigating, but also argued against his client's interests under the mistaken belief that the presence of a mental disorder was an aggravating factor. A misapprehension of the law that leads a lawyer to argue against his client's interests during the sentencing phase of a capital trial constitutes an "inadequac[y] in

rudimentary trial preparation and presentation" that falls outside the range of competent assistance. *Bean*, 163 F.3d at 1080; *see also Huynh v. King*, 95 F.3d 1052 (1996); *Scarpa v. DuBois*, 38 F.3d 1 (1st Cir.1994); *Morris v. California*, 966 F.2d 448, 454–55 (9th Cir.1991); *Blackburn v. Foltz*, 828 F.2d 1177 (6th Cir.1987). In short, Smith has presented a colorable claim of counsel's deficient performance.

Smith has, moreover, made a "colorable claim" that his counsel's deficient performance prejudiced him. The Supreme Court recently held that an attorney's failure to conduct an investigation into a petitioner's abusive childhood, borderline mental retardation, and prison record satisfied *Strickland*'s prejudice prong. *See Williams*, 120 S.Ct. at 1515. This was because, as the Court explained, "[m]itigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* at 1516; *see also Smith*, 189 F.3d at 1013 ("We previously have found Strickland's prejudice prong met where we concluded that defense counsel effectively presented no mitigating evidence at sentence, despite the presence of aggravating factors."); *Correll*, 137 F.3d at 1413 ("[B]ecause trial counsel failed to represent any evidence of Correll's purported mental illness which may have satisfied Ariz. Rev. St. § 13-703(E), Correll has 'undermined confidence in the outcome' of the sentencing, thereby establishing the requisite Strickland prejudice.") (quoting *Strickland*, 466 U.S. at 694-95, 104 S. Ct. 2052). Prejudice is especially likely where, as here, "this is not a case in which a death sentence was inevitable because of the enormity of the aggravating circumstances." *Bean* 163 F.3d at 1081; *see also Clabourne v. Lewis*, 64 F.3d 1373, 1387 (9th Cir.1995). In this case, the prosecution argued that only one aggravating factor existed. In response, Smith's lawyer not only allegedly failed to investigate his horrific childhood, mental retardation and possible brain damage, but also failed to do basic legal research. Smith has not only presented abundant evidence of deficient performance, but also of prejudice. There can be no question that he has satisfied the standard for obtaining an evidentiary hearing.

VI.

We reverse the judgment of the district court and remand for an evidentiary hearing. We remand so that the district court can determine whether Smith's allegations that his attorney neither investigated his mental condition nor presented adequate mitigating psychiatric testimony during the sentencing phase are true and, if so, *1201 whether he was denied effective assistance of counsel.

Concurrently herewith we file a memorandum disposition in which we affirm the petitioner's conviction and the district court's ruling that the especially heinous, atrocious, and cruel aggravating factor applies in this case for the reasons stated therein. Accordingly, the judgment below is

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED for further proceedings consistent with this opinion.

APPENDIX B

Smith v. Lewis, Unpublished Order of District Court filed October 31, 1996 denying Supplemental Petition

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

[Filed Oct. 31, 1996]
Clerk, U.S. District Court
District of Arizona
By SMS Deputy

ROBERT DOUGLAS SMITH,	)	No. CIV 87-234-TUC-RMB
Petitioner,	)	
vs.	)	ORDER
SAMUEL E. LEWIS, et al.,	)	
Respondents.	)	

Before the Court is Petitioner Robert Douglas Smith's Supplemental Habeas Claim and Request For Expert Witness Fees. At issue is whether Smith's ineffective assistance counsel claims are procedurally barred with no exception available. Respondents move to deny the relief sought. After a review of the pleadings and record, the Court concludes that the claims are procedurally defaulted with no cause and prejudice shown. No fundamental miscarriage of justice will occur by the dismissal of this Petition.

Procedural Background

Smith was represented at trial by Thomas Hippert, an assistant public defender. A new assistant public defender, Lawrence Fleischman, represented Smith during his 1982 direct appeal. The Arizona Supreme Court affirmed Smith's conviction and death sentence. *State v. Smith*, 138 Ariz. 79, 86-87, 673 P.2d 17, 24-25

(1983), *cert. denied*, 465 U.S. 1074 (1984). In 1984, Fleischman field an petition for post-conviction relief pursuant to Rule 32, Arizona Rules of Criminal Procedure. One ineffective assistance of trial counsel claim was raised relating to Hippert's failure to object to the trial court's reliance on hearsay evidence in the presentence report. The trial court found the claim precluded under Rules 32.2(a)(2) and (a)(3), waived for lack of objection at the sentencing hearing and meritless for reasons detailed in its April 17, 1985 Minute Entry. The Arizona Supreme Court denied review without comment.

In 1989, assistant public defender, John Palumbo filed a second Rule 32 petition while simultaneously acting as Smith's attorney in his federal habeas petition. No claims of ineffective assistance of counsel were raised. All claims were found precluded. The Arizona Supreme Court again denied review without comment. The United States Supreme Court denied certiorari.

While briefing was being completed by Palumbo on Smith's federal habeas petition, the Court received a letter directly from Smith expressing his desire to raise an ineffective assistance of counsel claim. Because the Public Defender's Office had represented Smith at all stages of his litigation, the Court determined that this was an issue Arizona should address. Hence, the Court allowed Smith to pursue that claim in state court while simultaneously proceeding with the briefing of his other federal habeas claims before this Court. On September 5, 1996, the Court denied those claims but allowed Smith to supplement his petition with the ineffective assistance of counsel claims presented to the state courts.

The trial court dismissed Smith's third Rule 32 petition on October 24, 1995 and denied a motion for rehearing on December 20, 1995. The Arizona Supreme Court denied review without comment.

Discussion

First, Petitioner asserts his ineffective assistance of counsel claims are not procedurally barred because the state court ruled on the merits. The Court disagrees.

On October 24, 1995, the trial court ruled:

> This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.
>
> The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material issue of fact or law exists which would be served by any further proceedings. Therefore,
>
> IT IS ORDERED dismissing the petition.
>
> This order is based on the following findings:
>
> The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.
>
> The claims are so old they are (1) *precluded by failure to bring them previously, in accordance with Rule 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).*

Minute entry dated October 24, 1995 (emphasis added). It is clear that the trial court found the claims precluded as a matter of state law.

Smith subsequently filed a motion for rehearing. It is this second minute entry which Smith asserts the trial court ruled on the merits of his claims thereby preserving them for federal habeas review. In denying the motion for rehearing, the state court found "The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffectiveness of counsel, or considered it, thought counsel ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous." Minute Entry of December 20, 1995. This language does nothing more than track the language of the October 24, 1995 minute entry. The language in both minute entries does nothing more than elaborate, albeit colorfully, why it dismissed Smith's third Rule 32 "due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner." Minute Entry of October 24, 1995. Smith's ineffective assistance of counsel claims were dismissed expressly for failing to conform the to the requirements of Arizona procedure. Accordingly, Smith's ineffective assistance of counsel claims are procedurally barred.

The Court may address the merits of the procedurally defaulted claims if Smith can show cause for the procedural default and actual prejudice therefrom. *Bonin v. Calderon*, 77 F.3d 1155 (9th Cir.), *cert. denied*, 116 S.Ct. 980 (1996); *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). To demonstrate cause, Smith must show the existence of "some objective factor external to the defense [which] impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). A showing that the factual or legal basis for a claim was not reasonably available to counsel or some interference by officials making counsel's compliance with the state procedural rules impracticable would constitute cause. *Id.* Lacking cause and prejudice, the Court may nonetheless consider procedurally barred claims if failure to do so would result in the conviction or execution of "one who is actually innocent." *Schlup v. Delo*, ___ U.S. ___, ___, 115 S.Ct. 851, 864, 130 L.Ed.2d 808 (1995).

Smith contends that the following supports a finding of cause: (1) the Public Defender's failure or refusal to challenge the conduct of a member of its own staff; (2) the Public Defender's failure to investigate and present psychological evidence; and (3) the ineffectiveness of appellate counsel. The Court finds that these allegations do not establish cause. Because Hippert simply chose to pursue evidence that was readily available and did not present an available claim does not establish cause. *Carrier*, 477 U.S. at 486, 106 S.Ct. at 2644 (counsel's failure to recognize the factual or legal basis for a claim or failure to raise the claim despite recognizing it does not constitute cause). Similarly, attorney ignorance or inadvertence in failing to raise certain claims in his state appeal is not "cause". *Id.* at 488. Thus, the mere fact that Fleischman did not raise any ineffective assistance of counsel claims in the direct appeal is not cause. Moreover, in reviewing the merits of Smith's federal habeas petition, this Court found no constitutional error. *See* Amended Order of September 5, 1996. The Public Defender's Office would have had no basis to challenge the conduct of a member of its own staff who applied sound trial strategy or elected to pursue one claim over another.

The record also does not support a finding that Smith's execution would constitute a fundamental miscarriage of justice. To be actually innocent of the death penalty, Smith must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty. *Sawyer v. Whitley*, 505 U.S.333, ___, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992). The fundamental miscarriage of justice exception applies to the sentencing phase of a capital trial to one who is "actually innocent" of the death penalty. *Smith v. Murray*, 477 U.S. 527, 537-38, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). A valid claim under this exception, however, is extremely rare. *Schlup*, 513 U.S. at ___, 115 S.Ct. at 864.

Today, Smith requests expert witness fees to allow him to be examined by a psychologist in order to demonstrate that he is actually innocent of the death penalty. He hopes to prove that such an examination will establish a single significant mitigating factor justifying the imposition of a life sentence. This request for a favorable hindsight evaluation is speculative. But more importantly, additional

mitigating evidence is not available to prove actual innocence for the death sentence under this exception. The actual innocence requirement focuses on the elements of eligibility, such as the existence of at least one aggravating factor, "and not on additional mitigating evidence which was prevented from being introduced as a result of claimed constitutional error." *Sawyer v. Whitley*, ___ U.S. at ___, 112 S.Ct. 2523. Thus, the Court agrees with Respondents that Smith offers nothing to rebut the presumption that he is eligible for Arizona's death penalty beyond a reasonable doubt and that the death sentence is appropriate in his case. *See State v. Smith*, 138 Ariz. 79, 86-86, 673 P.2d 17, 23-24 (1983).

Conclusion

IT IS ORDERED that Petitioner Robert Douglas Smith's Request for Expert Witness Fees is DENIED;

IT IS FURTHER ORDERED that Respondent's Motion to Deny Expert Witness Fees and to Dismiss all Supplemental Habeas Claims is GRANTED and Petitioner Robert Douglas Smith's Petition for Habeas Corpus is DENIED WITH PREJUDICE and hereby DISMISSED.

Dated this 30 day of October, 1996.

S/_____
Richard M. Bilby
Senior United States District Judge

APPENDIX C

Smith v. Lewis, Unpublished Decision of District Court of Arizona (No. CIV 87-234 TUC RMB, filed September 5, 1996)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROBERT DOUGLAS SMITH,

Petitioner,

vs.

SAMUEL E. LEWIS, et al.,

Respondents.

NO. CIV 87-234 TUC RMB

AMENDED MEMORANDUM OPINION AND ORDER

This order amends the original Order filed on September 4, 1995 to correct two typographical errors.

Petitioner Robert Douglas Smith, under sentence of death, petitions the Court for a Writ of Habeas Corpus pursuant to 28 U.S.C. 2254. For the reasons set forth below, the Court herein denies the petition.

I. FACTUAL BACKGROUND

In early 1980, Petitioner Robert Douglas Smith, Joe Lambright, and Lambright's lover, Kathy Foreman, began a cross-country trip, driving from Texas to Florida, then heading for California. En route to California, the trio stopped outside Tucson, Arizona, camping out in a remote area.

During the trip, Lambright and Foreman had been openly having sex in front of Smith. When Smith complained about not having someone to have sex with, Lambright announced that they would find someone for Smith. Lambright also said that he would like to kill someone "just to see if he could do it." (RT. at 698).

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The trio began driving around Tucson, then after some time, picked up Sandra Owen. Ms. Owen explained that she needed a ride to the food stamp office. When the group reached the food stamp office, Lambright got into the back seat with Owen. He told her to "shut up and be quiet and she wouldn't get hurt." (RT. at 703-04). Smith began driving, heading toward Phoenix on Interstate 10.

At some point during the trip, Owen told the trio that she was on medication for a psychological condition, that she had just been released from a mental health treatment facility, and that she wanted to go home. At some other point, Smith got into the back seat and raped Owen.

Later, they turned off the freeway, onto a dirt road. When they could drive no further, they parked the car and walked up the side of a mountain to a level spot. By this time, it was dark and cold. They built a fire and then Lambright and Foreman once again had sex. Smith once again raped Owen.

Smith began choking Owen from behind. Lambright took Foreman's knife and began stabbing Owen in the chest. When Owen fell to the ground, Lambright again stabbed her, and then Smith tried to break her neck by twisting it. Seeing that Smith was not succeeding in killing her, Lambright cut her neck. As Owen struggled to lift herself up on one elbow, Lambright smashed her head with a rock. Lambright and Smith piled rocks on the body, and the three drove onward to California.

About a year later, law enforcement received a tip about the murder. Lambright, Smith and Foreman were each questioned separately. Foreman was given complete immunity from prosecution in exchange for her testimony. Smith and Lambright were returned to Arizona for trial.

II. PROCEDURAL BACKGROUND

The Petitioner was tried by jury in Pima County, Arizona and convicted of, inter alia, first degree murder. Pima County Superior Court Judge Michael Brown sentenced Smith to death for the murder. Smith appealed to the Arizona Supreme Court, which affirmed the conviction and sentence in *Arizona v. Smith*, 673 P.2d 17 (1983), *cert. denied*, 465 U.S. 1074 (1984).

He sought post-conviction relief in the state trial court pursuant to ARIZ. R. CRIM. P. 32. This first Rule 32 petition was filed in superior court on April 20, 1984 and was denied a year later. A year after that, on April 25, 1985, Smith sought rehearing, which was denied by the trial court on March 4, 1986. The state supreme denied review and set execution for April 29, 1987.

On April 14, 1987 Smith first filed in this Court an application for stay of execution and petition for writ of habeas corpus. This Court stayed the execution and certified a question to the state supreme court, asking whether Arizona public defenders may represent habeas petitioners in federal court. The supreme court answered in the affirmative in August 1988.

Shortly thereafter, the Respondents moved to dismiss the mixed petition for writ of habeas corpus. The Court granted the State's motion on December 14, 1988, but retained jurisdiction pending exhaustion of state remedies and continued the stay of execution, allowing Smith to exhaust his claims in state court. Smith did not return to the state court until December 8, 1989, a year after this Court's Order, when he filed his second Rule 32 petition.

The superior court denied the second Rule 32 petition on August 8, 1991 and denied a motion for rehearing on May 4, 1993. The Arizona Supreme Court denied review on October 5, 1993. A year later, on November 21, 1994, Smith filed his amended petition for writ of habeas corpus with this Court. After numerous delays and frustrated efforts to obtain the complete state record, the Court now proceeds to consider Smith's claims.

III. DISCUSSION

Smith presents twenty-eight claims, delineated as thirteen trial claims and fifteen sentencing claims. Each is considered in turn.

A. Trial Claims

1. Lesser-Included Offenses Instructions

Trial claim one alleges that the trial court erred in failing to give a requeste instruction on second degree murder, and in failing to sua sponte instruct on assault. Smith that his statements, which contradicted Foreman's testimony, presented sufficient evidence jury to conclude that Smith committed only the lesser offenses of second degree murder or as This assertion is unsupported in fact and law.

A capital defendant is constitutionally entitled to an instruction on lesser offenses evidence would support a finding of guilt of such offenses. *Beck v. Alabama*, 447 U.S (1980). However, there is no constitutional requirement to instruct upon every possible l offense supported by the evidence. *Schad v. Arizona*, 501 U.S. 624 (1991), and there is cert no constitutional requirement to instruct upon lesser-included offenses that are not supporte the evidence adduced at trial. *Hopper v. Evans*, 456 U.S. 605 (1982).

The evidence Smith looks to in support of this claim is that in his statements to the pol he indicated that he did not want to kill Owen, but rather only began applying pressure to her r so that she would pass out. This, according to Smith, was so that the trio could escape w Owen was unconscious, and to spare her from Lambright and Foreman's intended deviant sex acts. He denied further participation in the killing of Sandy Owen.

Like the trial court and the supreme court, this Court concludes that the kidnaping was in progress at the time of the killing. Smith's act of choking Owen was the first act in the cou of the killing. No evidence supports the claim of lack of premeditation. Trial claim one is den on the merits.

2. Felony Murder Instruction

The Petitioner next challenges the felony murder jury instruction, claiming that improperly shifted the burden of proof to the defendant. That is, the trial court erred

instructing that the "in the course of" and "in furtherance of" elements were proven if the death and the underlying felonies were part of the same series of events. This, Smith posits, completely relieved the State of its burden of proving the "in furtherance of" element. This claim is precluded from federal habeas review.

As fully discussed in *Lambright v. Lewis, et al.*, No. CIV 87-235 TUC RMB, 1996 WL 391848 (D. Ariz. July 9, 1996), which is attached as Exhibit A, where a state court declines to consider a state prisoner's federal claims because he failed to meet a state procedural requirement, the doctrine of procedural default precludes federal habeas review. This is because the state decision denying consideration rests on independent, adequate state procedural grounds. A federal court will not review a state court decision that rests on state law that is independent of federal law and is adequate to sustain the decision. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Harris v. Reed*, 489 U.S. 255 (1989); *Ulster Count Court v. Allen*, 442 U.S. 140, 148 (1979); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935).

In this case, the state law ground is Rule 32.2(a)(3), which provided that a "petitione will not be given relief under this rule based upon any ground . . . [k]nowingly, voluntarily and intelligently not raised at trial on appeal, or in any previous collateral proceeding." ARIZ. R. CRIM. P. 32.2(a).

When Smith raised this claim for the first time in his second post-conviction petition, Judge Brown ruled that the claim was precluded for failure to raise it on direct appeal or in the previous post-conviction petition. (Pima County Superior Court Minute Entry of Aug. 28, 1991 at 2). The parties agree that Judge Brown ruled that Smith's claim was precluded under Rule 32.2(a)(3), but Smith now argues that the rule cannot bar federal habeas review because it is not consistently applied by the state courts. This argument is unavailing.

To constitute an adequate state ground barring federal review, a state rule must be regularly and consistently applied by the state's courts. *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991);

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Dugger v. Adams, 489 U.S. 401 (1989); *Hathorn v. Lovorn*, 457 U.S. 255, 262-63 (1982); *Harmon v. Ryan*, 959 F.2d 1457 (9th Cir. 1992). The Ninth Circuit Court of Appeals recently stated that the

> contention that the Arizona Supreme Court has not regularly and consistently relied on procedural default has no merit. *See Carriger v. Lewis*, 971 F.2d 329, 333 (9th Cir. 1992), *cert. denied*, 507 U.S. 992 (1993) (rejecting argument that Arizona's reliance on procedural default was so unpredictable and irregular that it does not provide an adequate ground for disposing of claims).

Martinez-Villareal v. Lewis, 80 F.3d 1301, 1306 (9th Cir. 1996) (parallel citation and additional history omitted, style added). There can be no doubt in this circuit that Arizona's Rule 32.2(a) is regularly and consistently applied and thus is an adequate state ground barring federal review.

Nonetheless, Smith points to the ruling of Judge Brown in one of Lambright's post-conviction petitions. Smith notes that when Lambright presented a defaulted claim in his second habeas petition, the Judge determined that because it was a capital case, he was required to reach the merits of the defaulted claim in light of *Arizona v. Carriger*, 692 P.2d 991 (Ariz. 1994). Yet Smith does not note that Judge Brown amended that ruling, providing a clear, express statement that he was relying on Rule 32.2(a) to deny the claim. *See* Pima County Minute Entry of Apr. 9, 1993 at 2 ("he has waived the right to assert this claim in this petition and the claim is precluded"). With the amended minute order, the trial court judge reached the same result in Lambright's second petition that he reached in Smith's second petition, and for the same reason. Smith has procedurally defaulted on this claim.

Notwithstanding Smith's default, the Court would proceed to consider the merits of the claim if he demonstrated cause and prejudice to overcome the default. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 (1977). The Court would also reach the merits if the Petitioner made a showing that failure to consider the merits would result in a fundamental miscarriage of justice. *Murray v. Carrier*, 477 U.S. 478, 494-95 (1986); *Engle v. Isaac*, 456 U.S. 107, 109 (1982). The

Petitioner makes no effort to establish cause and prejudice. He also does not, and could not, show a fundamental miscarriage of justice. As such, trial claim two is denied as precluded.

3. Dual Juries

The trial court granted Smith's motion to sever the trials of Smith and Lambright, but conducted one trial with two separate juries. There were separate opening statements and closing arguments, and when evidence was admissible against only one defendant, the other jury was excused.

The Petitioner contends that the use of dual juries violated his constitutional rights by depriving him of a fair trial. The Court considered this contention when raised in Lambright's petition, and concluded that the dual jury procedure comported with constitutional standards. *Lambright v. Lewis, et al.*, No. CIV 87-235 TUC RMB, 1996 WL 391848 (D. Ariz. July 9, 1996). For the same reasons, the Court rejects the contention that Smith was prejudiced by the use of two juries and denies trial claim three.

4. Recross-examination of Foreman

Smith's statements to police maintained that he only had intercourse with Owen once--at the campsite--and that it was consensual. However, at trial Foreman testified that Smith had forced sex upon Owen in the backseat of the car and again on the mountain where they camped. Smith's counsel cross-examined Foreman on this issue and impeached her with an earlier statement and prior testimony where she indicated that she did not know whether the sex was consensual.

The trial court allowed the prosecutor to reopen his case and ask Foreman additional questions, but refused Smith's requests to re-cross in the absence of "new areas." The prosecutor presented evidence of discrepancies between the tape and the written transcript of an earlier hearing. He was attempting to rehabilitate Foreman by showing that she had not made prior inconsistent statements. He also had Foreman identify Owen's shoe and testify that she had told the police where all the events occurred.

When Smith attempted to ask Foreman about differences in her statements, the court sustained the State's objection because this was "improper recross." Smith stresses that without an opportunity for him to clarify, the jury could have concluded that inconsistencies in two prior statements were the result of transcription errors. In fact, it was only one statement from the preliminary hearing--not the other--that was mistranscribed. The other statement, Smith maintains, was a prior inconsistent statement. Smith submits that this violated the Confrontation Clause because the prosecutor had introduced new matter that Smith was unable to challenge. The Court disagrees.

The trial court directed defense counsel to object should any new matter arise during the second examination of Foreman. No objection was made. Further, counsel refused to tell the court the areas upon which he sought re-cross. More importantly, Smith had already cross-examined Foreman on the prior inconsistent statement. He was allowed effective cross-examination and the court's refusal to allow further, unknown recross-examination did not impair Smith's rights of confrontation. *See Delaware v Van Arsdall*, 475 U.S. 673, 679 (1986). Trial claim four is denied on the merits.

5. County Attorney as Witness

The Petitioner complains that Paul Banales, a county prosecutor, was impermissibly allowed to testify. For the reasons explained in *Lambright*, this claim is precluded.

6. Closing Arguments Comments

In trial claim six, the Petitioner protests that the prosecutor's improper comments during closing argument violated his constitutional rights. Specifically, the prosecutor said

> Mr. Hippert's [Smith's trial counsel] job wast to get his client off. That's it. My job is to produce this evidence and argue from it and ask you to convict for a crime which Mr. Smith should not be let go. Mr. Hippert is asking you to let him go, to let him walk out of the courtroom after being involved in the things he did.

(R.T. at 1383-84). These comments came in rebuttal, after Smith's counsel had said

> Now, Mr.Himelic [the county prosecutor], when he was standing up here, said that your job -- and I think he said something about your only job or your purpose is to apply the law to the case. Well, his job is to make things easy for the government, to grease the wheels or whatever and you have more a job than just to apply the law to the case. Your job is to use your common sense, to use your experience and to think about the facts and consider the facts and apply the law to the facts.

(R.T. at 1360).

This Court certainly would not encourage such conduct by either attorney. However, in determining whether or not the comments are of constitutional magnitude, the Court looks to whether they affected the fundamental fairness of the trial. "[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context; only by doing so can it be determined whether the prosecutor's conduct affected the fairness of the trial." *United States v. Young*, 470 U.S. 1, 11 (1985). There is no constitutional violation unless the improper comments were so prejudicial that they rendered the trial fundamentally unfair within the meaning of the Due Process Clause. To establish such prejudice, a federal habeas petitioner must show that either the misconduct was persistent and pronounced, or that the evidence was so insubstantial that the jury probably would not have convicted in the absence of the misconduct. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974). Smith has not, and could not, make such a showing.

The prosecutor's comments, while improper, were brief and were not repeated. They did not detract from the overwhelming evidence of guilt and the cruel manner of the murder. The evidence, notwithstanding either lawyer's perceptions of each other's jobs, established without a doubt that Smith was guilty of the murder of Sandy Owen. The jury was properly instructed on the law and told that comments by the attorneys were not evidence. The prosecutor's comments came in response to defense counsel's statement and did not improperly attack the evidence, rather the attack was upon the attorney. The Court finds that this exchange, although distasteful

and inappropriate, did not affect the fundamental fairness of Smith's trial. Accordingly, trial claim six is denied on the merits.

7. Requested Jury Instruction No. 10

The trial court denied a requested jury instruction which would have provided a caution about considering the charges against each defendant separately. As explained in *Lambright*, the cases were tried with two different juries. The proposed instruction was not needed and had the potential to confuse because Smith's juries would not be considering any charge against Lambright, and vice-versa. Only the Smith jury heard evidence admissible only against Smith and vice-versa. For the reasons discussed in *Lambright*, trial claim ten is denied as precluded and alternatively on the merits.

8. Jury Death Qualification

The Petitioner posits in trial claim eight that the voir dire questions designed to "death qualify" the jury violated the Sixth and Fourteenth Amendments. This position is untenable. It was considered and rejected in *Lambright*, and for the same reasons, is rejected today. This claim is denied as precluded, due to the Rule 32 court's finding of preclusion based upon Rule 32.2(a)(3). (Pima County Superior Court Minute Entry of Aug. 28, 1991, at 2). It is alternatively denied on the merits as explained in *Lambright*.

9. Voluntariness of Statements Made in Texas

When officers arrested the Petitioner in South Houston, Texas, they provided him *Miranda* warnings. A magistrate also read to Smith *Miranda* warnings after arrival at the police department. When officers began interrogating Smith, he made an inculpatory statement. They talked about Smith's more recent activities, such as his church involvement and his new wife. The police told Smith that his first statement did not "sound right" and asked if he was telling the truth. Smith became emotional and made a second incriminating statement.

At this point, the officers allowed Smith to speak with his wife. Smith's wife and mother-in-law arrived and spoke with him for about 45 minutes. They told him to "trust in God" and to "tell the truth." (R.T. at 188, 212). Smith was visibly distraught and his wife was crying.

Smith told the officers that he had previously attempted suicide because of Owen's killing. He said that he would make a written statement, and later did so after again being read his *Miranda* rights.

Following a hearing, the trial court denied Smith's motion to suppress the statements as involuntary. In the present petition, Smith argues that the trial court erred in admitting the statements because Smith's low intelligence made him particularly susceptible to coercion. With an IQ of 71 and little formal education, he claims that his waiver of his *Miranda* rights was not made knowingly, intelligently and voluntarily. Smith also argues that by placing him with his emotional, highly religious relatives, the police schemed to allow compelling influences to elicit harmful statements. This argument is not persuasive on these facts.

A federal court reviews de novo a state court's ultimate finding of voluntariness, but does so with respect for the "considered conclusions of a coequal state judiciary." *Greenawalt v. Ricketts*, 943 F.2d 1020, 1027 (9th Cir. 1991) (quoting *Miller v. Fenton*, 474 U.S. 104, 112 (1985), *cert. denied*, 506 U.S. 888 (1992). Further, the state judge's decision as to whether a waiver was knowing and intelligent is entitled to a presumption of correctness. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (en banc), *cert. denied*, 112 S. Ct. 870 (1992). In reviewing Judge Brown's findings, this Court concludes that they are supported by the record, and independently determines that Smith's statements were voluntarily given.

Although Mr. Smith apparently possesses a low intelligence quotient and minimal education, these factors did not impact on the voluntariness of his inculpatory statements. A confession or waiver of *Miranda* rights that is prompted by a mental or emotional condition is not involuntary, absent police coercion. *See Colorado v. Connelly*, 479 U.S. 157 (1986); *Arizona v.*

Mauro, 481 U.S. 520 (1987). There are no indicia of police coercion in this record, and Smith makes no such challenge. Unlike the cases cited by the Petitioner, this record shows no external pressure that Smith was forced to attempt to overcome. This Court cannot conclude that a person with an eight grade education and 71 IQ is incapable of acts of free will. While such a person may be vulnerable to psychological coercion, there was no such coercion in this case.

The facts here indicate that Smith did confess of his own free will and comprehended the circumstances. He said that he felt a great deal of guilt and distress and had previously attempted suicide. The officers testified that he was eager to confess and wanted to help locate the body. He spoke in a narrative and was not subjected to a demanding questioning session. He said that he understood his rights and wrote out a detailed statement.

The facts also indicate that Smith's emotional state following his family's arrival was not a result of any police ploy. Quite the opposite, the record suggests that the police were motivated by concerns for Smith and by a desire to obtain a map that Smith's wife was to bring to the police department. No facts reveal that the police knew that Smith's relatives were particularly religious or would urge him to tell the truth. While Smith may have been prompted or influenced, it was by his family, not police officials. In allowing Smith to visit with his family, rather than plotting, the officers were simply submitting to Smith's requests. Any influence on Smith as to his statements was not a result of any police conduct. In sum, trial claim nine is not supported by the record and is denied on the merits.

10. Voluntariness of Statements Made in Arizona

The Petitioner next argues that the incriminatory statement made after his return to Arizona were improper fruit of the Texas statements and were violative of his right to counsel. These arguments are unavailing.

As explained above, the Texas statements were not involuntarily made. Therefore, any subsequent statements are not improper fruit of those statements. As to the right to counsel aspect

of this claim, this Court agrees with the Petitioner that the State violated his right to have counsel present when he reviewed a transcript of his tape-recorded statement.

When Smith was told that he had the right to have his attorney with him when he reviewed the transcript, he said that although his lawyer had instructed him not to talk about the case, he wanted to go through the statement with the officer without counsel. (R.T. at 401-02). Smith wanted to do so, even though he recognized that his attorney "would be mad at him." (R.T. at 402). The officer and Smith then proceeded to make corrections to the statement that was ultimately admitted at trial.

This would appear to show a clear waiver of the right to counsel. However, the Petitioner correctly points out that any waiver of the presence of counsel after a demand is made following a formal charge is invalid. *Michigan v. Long*, 475 U.S. 625, 635-36 (1986). The State may not initiate any interrogation if the accused has invoked his right to counsel, even if it is undeniably clear that the accused wants to speak without his counsel present. Any conversation must be at the accused's initiation.

While it is not factually clear in this case that an interrogation took place, the Court assumes that the detective's presence and discussion with Smith was an interrogation. The State does not argue this point. As such, the detective's presence and discussion after Smith had been formally charged and had invoked his right to counsel, violated his Sixth Amendment right to counsel.

This indicates this Court's disagreement with the Arizona Supreme Court's review of this claim. The supreme court did not have the benefit of *Long*, which was decided three years later. Despite this disagreement on waiver of right to counsel, this Court does agree with the supreme court's conclusion that the statement in question would have been admissible even without Smith's participation in a review of the statement. The statement would have come in to evidence even

if the detective had never met with Smith. Furthermore, this statement was merely cumulative of other valid confessions. Thus, no harm befell Smith and trial claim ten is denied on the merits.

11. Form of Verdict

Smith complains that the form of verdict only allowed a verdict of guilty or not guilty, even though the judge instructed the jury on both felony murder and premeditated murder. Thus, it was possible that the jury failed to reach a unanimous verdict in violation of the Due Process Clause.

Smith acknowledges that *Schad v. Arizona*, 501 U.S. 624 (1991) held that the Constitution does not mandate separate verdicts for felony murder and premeditated murder. As such, trial claim eleven presents no constitutional error and is denied on the merits.

12. Admissibility of Petitioner's Statements

At trial, the Petitioner moved to admit statements made to a detective that he "wished the entire thing were over" and that "I did not kill anybody" and "the only one that did any killing got full immunity out of this." (R.T. at 1201-06). The trial court sustained the State's objection, ruling that the statements were inadmissible hearsay. Smith argues that the exclusion of the statements violated his rights under the Fifth, Six and Fourteenth Amendments to the United States Constitution. This Court disagrees.

It is doubtful that this claim was properly exhausted because it was not presented as a federal claim in state court. It is technically exhausted though, and is, at any rate, denied on the merits. This is because the trial court's exclusion of these statements did not render the trial fundamentally unfair. *See Jeffries v. Bodgett*, 5 F.3d 1180, 1192 (9th Cir. 1993) (a state evidentiary ruling warrants federal habeas relief only when due process is violated by fundamental fairness), *cert. denied*, 114 S. Ct. 1294 (1994). The statements are exculpatory and were not offered by an opponent, and as such do not fall within an exception to the hearsay rule. Even if they were not entirely exculpatory, the trial court did allow substantially the same statements.

when a detective testified that Smith said that he did not do the killing--Lambright and Foreman had. (R.T. at 1222). Failure to allow inadmissible hearsay does not violate due process, especially where substantially the same evidence is properly admitted. *See Estelle v. McGuire*, 502 U.S. 62 (1991) (admission of challenged evidence does not rise to the level of due process violation). Trial claim twelve is denied on the merits.

13. Juror Questionnaires

The jurors were given written questionnaires to answer. These completed questionnaires were not made part of the appellate record. Smith contends that the trial court's failure to include the questionnaires in the record denied him meaningful appellate review of the propriety of the questionaires. Smith cannot prevail on this contention. For the reasons explained in *Lambright*, this claim is denied as precluded and is also without merit.

B. Sentencing Claims

1. Construction of Arizona's Death Penalty Statutes

In his first sentencing claim, Smith argues that the imposition of the death penalty is unconstitutional in his case because of the presence of significant mitigating evidence and only one aggravating factor. He contends that the Constitution requires a narrowed construction of the death penalty statutes that prevents the imposition of death in such a case. This Court finds no constitutional error.

For the reasons explained in *Lambright*, this Court declines to conclude that the Constitution or the Arizona statute requires life over death when only one aggravating factor exists. Rather, the requirement is for an individualized balancing of aggravating and mitigating evidence in each case.

Such an individualized balancing was performed by both the trial court and supreme court. This Court agrees with the supreme court that Ms. Owen

> was made to suffer great mental anguish and physical pain prior to her death. Defendant Smith shares full responsibility for the cruelty toward Ms. Owen. In fact, he was the one who repeatedly raped the victim prior to murdering her. Cruelty was clearly established.

Arizona v. Smith, 673 P.2d 17, 23 (1983) (en banc), *cert. denied*, 465 U.S. 1074 (1984). The aggravating factor was proven without doubt. Smith argues that despite the existence of this single aggravating factor, the significant mitigating evidence militates toward life.

The supreme court did note that the mitigating evidence presented was significant. Smith had low intelligence, a troubled home life when he was young, and learning difficulties in school. He also lacked a prior record of serious crime, had adjusted well to new marital and parental responsibilities, and experienced remorse following Owen's death. Further, Foreman, a fellow perpetrator and active participant in the crimes was given complete immunity and never spent even one night in jail. While this evidence is significant in mitigation, it will only call for a life sentence if it is sufficiently substantial to call for leniency. This Court agrees with the supreme court that this evidence is not sufficiently substantial in light of the cruelty of the crime.

It is true that Lambright repeatedly stabbed Owen and imposed the final blow. The mitigating evidence submitted by Lambright was considerably less, in both force and quantity. However, as explained in *Lambright*, the supreme court exercised its independent judgment in weighing the aggravating and mitigating factors in both cases. There is no constitutional error in the weighing process or its results. Sentencing claim one is denied on the merits.

2. "Especially Cruel" Aggravating Factor

The Petitioner next argues that the Arizona courts failed to adhere to a single limiting construction of the "especially cruel factor" or A.R.S. § 13-703(F)(6). This argument is rejected for the reasons stated above, as well as those stated in *Lambright*, and because of Smith's attempts to break Owen's neck after she had been stabbed, but while she was still conscious. He initiated the killing by choking her, repeatedly raped her and placed her in great fear. He held her down as she was stabbed and cut. This is precisely the construction of the "especially cruel manner"

factor approved by the United States Supreme Court in *Walton v. Arizona*, 497 U.S. 639, 654 (1990). The Supreme Court had the benefit of the state supreme court's decisions in *Lambright* and *Smith*, as well as numerous others cited by the Petitioner, when it determined that Arizona's construction of § 13-703(F)(6) meets constitutional requirements. Sentencing claim two is denied on the merits.

3. Consideration of Mitigating Factors

As did Lambright, Smith argues that the Arizona courts failed to individually and cumulatively weigh the mitigating evidence proffered. For the reasons discussed in *Lambright*, this claim is denied. The state supreme court affirmatively stated that it had "considered all the mitigation presented." *Smith*, 673 P.2d at 24. Any error at sentencing was cured by the supreme court's independent balancing of all mitigation proffered. Sentencing claim three is denied on the merits.

4. State Supreme Court Review

The Petitioner posits that the supreme court erred by failing to adequately reweigh the aggravation and mitigation evidence and by failing to remand to the sentencing court for resentencing. This position is without merit. For the reasons discussed above and in *Lambright*, the state supreme court reviewed the evidence anew, independently taking into account all mitigation presented, and independently concluding that death was the appropriate sentence. This court finds no constitutional error.

5. Nonstatutory Aggravating Factors

The Petitioner contends that the trial court unconstitutionally relied on nonstatutory aggravating factors in imposing the death penalty. For the reasons stated in *Lambright*, this claim is denied as precluded, and alternatively, is denied on the merits.

6. *Enmund* Finding

Smith argues in sentencing claim six that the trial court's finding that he intende Owen and participated in her killing was contrary to *Enmund v. Florida*, 458 U.S. 782 For the reasons the Court rejected this claim in *Lambright*, it rejects it here as well. Sn a major participant in Owen's murder. The judge made a considered finding comporti *Enmund* without the use of Lambright's statements. This claim is denied on the merits.

7. Statements of Owen's Mother

Smith complains that Judge Brown relied upon the statements of Owen's mother, cor in the presentence report. As explained in *Lambright*, this claim is both precluded and mer The Rule 32 court found the claim precluded under 32.2(a)(3) and Smith has not demons cause and prejudice to overcome the procedural default. Also, the claim is without merit be the sentencing court did not rely on the mother's statements. *See McKenzie v. McCormic* F.3d 1415 (9th Cir. 1994) (uphoiding death sentence because sentencing decision not affecte judge's meeting with prosecutor); *Paradis v. Arave*, 20 F.3d 950 (9th Cir. 1994) (findin constitutional violation from private letter and in camera statements because there was no shov that the sentencing judge considered them); *Clark v. Ricketts*, 958 F.2d 851 (9th Cir. 19 (holding that judge's possession of presentence report during sentencing phase was constitutic because the judge based his findings on the evidence adduced at trial and not on the presente report), *cert. denied*, 506 U.S. 838 (1992). Further, any perceived error was cured on dir appeal. The supreme court did not consider any statement by the victim's mother when independently concluded that death was the proper sentence.

8. Presentence Report

Similarly, the Petitioner claims that other information in the presentence report should n have been considered by the sentencing court. As discussed above and in *Lambright*, th sentencing court did not rely on the presentence report and any potential error was cured by th

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supreme court's independent determination, without the presentence report, that death was the appropriate sentence. Sentencing claim eight is denied on the merits.

9. Right to Jury Trial

The Petitioner asserts that he has a constitutional right to a jury determination of aggravating factors. He does not. He acknowledges that *Walton v. Arizona*, 497 U.S. 639, 647-49 (1990) rejected this claim and upheld Arizona's sentencing scheme with judge determination of aggravating and mitigating factors. *See also Spaziano v. Florida*, 468 U.S. 447 (1984) (no constitutional requirement that sentence be imposed by jury); *Carriger v. Lewis*, 971 F.2d 329 (9th Cir. 1992) (Arizona's judge-only sentencing scheme is constitutional), *cert. denied*, 113 S. Ct. 1600 (1993). Sentencing claim ten is denied on the merits.

10. Burden of Proving Mitigation

Smith next asserts that A.R.S. § 13-703 places an unconstitutional burden of proving mitigation on the defendant. This too was rejected in *Walton*, 497 U.S. at 649-51. The Court declines the Petitioner's invitation to adopt Justice Blackmun's dissent in *Walton* and denies sentencing claim ten on the merits.

11. Presumption of Death

Again, Smith recognizes that his claim that Arizona's death statutes creates a presumption of death is foreclosed by *Walton*, 497 U.S. at 651-52. As such, it is denied on the merits.

12. Prosecutorial Discretion

In sentencing claim twelve, Smith argues that § 13-703 unconstitutionally allows the risk of arbitrary action by failing to guide a prosecutor's discretion in when to seek the death penalty. For the reasons discussed in *Lambright*, this claim is denied.

13. Discrimination in Sentencing

The Petitioner asserts that the death penalty has been discriminatorily imposed upon poor males convicted of killing a Caucasian. For the reasons discussed in *Lambright*, this claim is denied on the merits.

14. Court Determination of Sentence

Smith argues in sentencing claim fourteen that he had a constitutional right to be sentenced by a jury rather than a judge. For the reasons explained in *Lambright* and above with respect to sentencing claim nine, this claim is denied on the merits.

15. Notice of Aggravating Factors

In sentencing claim fifteen, Smith submits that he did not receive adequate notice of the aggravating circumstances the court used in sentencing him to death. For the reasons discussed in *Lambright*, this claim is denied on the merits.

IV. CONCLUSION

After having considered the Parties' excellent briefing and having carefully reviewed the entire state court record, the Court finds no constitutional error entitling Mr. Smith to relief. Therefore,

IT IS ORDERED that Robert Douglas Smith's "Amended Petition for Writ of Habeas Corpus by a Person in State Custody (28 U.S.C. § 2254)" filed November 21, 1994 is **DENIED** and **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Respondents' "Motion to Strike 'Additional Legal Issues.' Improperly Raised for the First Time in the Reply to Respondents' Answer to Petition for Writ of Habeas Corpus" filed April 25, 1996 is **DENIED**.

On August 23, 1996 the Petitioner submitted ineffective assistance of counsel claims by filing a "Supplement to Petition for Writ of Habeas Corpus" as instructed by the Court. He also filed a "Request for Expert Witness Fees." The Court will proceed to consider those claims.

IT IS FURTHER ORDERED that Respondents shall respond to the August 23rd filings not later than September 30, 1996. The response shall include a discussion of the State's position

on the issue of procedural default. The Petitioner's reply, if any, shall be filed not later than October 18, 1996. Extensions of time will be granted only upon a showing of extremely good cause.

DATED this 5-4 of ~~August~~ September, 1996.

RICHARD M. BILBY
Senior United States District Judge

APPENDIX D

Ninth Circuit Order in Smith v. Stewart Denying State's Petition For Rehearing And Suggestion For Rehearing En Banc dated May 15, 2001

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAY 15 2001

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

JOE LEONARD LAMBRIGHT, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	No. 96-99020 DC# CV-87-00235-TUC-RMB Arizona ORDER
ROBERT DOUGLAS SMITH, Petitioner-Appellant, v. TERRY STEWART, Director, Arizona Department of Corrections, Respondent-Appellee.	Nos. 96-99025, 96-99026 DC# CV-87-00234-TUC-RMB Arizona ORDER

Before: FERGUSON, REINHARDT, THOMPSON, Circuit Judges

The panel has voted to deny respondent's petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge has requested a vote on whether to hear the matter en banc.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E

State v. Smith, 138 Ariz. 79, 673 P.2d 17 (1983)

*17 673 P.2d 17

138 Ariz. 79

Supreme Court of Arizona,
In Banc.

STATE of Arizona, Appellee,
v.
Robert Douglas SMITH, Appellant.

No. 5595.
Sept. 28, 1983.

Reconsideration Denied Nov. 8, 1983.

Certiorari Denied Feb. 27, 1984.

See 104 S.Ct. 1429.

Defendant was convicted in the Superior Court, Pima County, Cause No. CR-05669, Michael J. Brown, J., of first-degree murder, kidnapping, and sexual assault, and he appealed. The Supreme Court, Cameron, J., held that: (1) trial court did not err in limiting defendant's right to recross-examine State's key witness; (2) there was no clear and manifest error in determination that circumstances surrounding defendant's giving of his confessions was not inherently coercive; (3) evidence did not support claim of lack of premeditation so as to require giving of instruction on second-degree murder; and (4) death sentence was properly imposed.

Affirmed.

Feldman, J., filed opinion concurring and dissenting in part.

West Headnotes

[1] Criminal Law ⇐1153(4)

110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception of Evidence
110k1153(4) Examination of Witnesses.

[See headnote text below]

[1] Witnesses ⇐267

410 ----
410III Examination
410III(B) Cross-Examination
410k267 Control and Discretion of Court.

Control of cross-examination is left to sound discretion of trial judge and will not be disturbed on appeal absent showing from record of an abuse of discretion.

[2] Witnesses ⇐291

410 ----
410III Examination
410III(C) Re-Examination
410k291 Recross-Examination.

Where defendant's counsel declined to specify any new areas he wished to inquire into on recross-examination, notwithstanding that judge offered full opportunity to recross-examine State's key witness on any new areas brought out on redirect, and gave him opportunity to conduct recross on any new point opened up on cross-examination by codefendant, trial court did not err in limiting his right to recross-examine that witness.

[3] Criminal Law ⇐519(9)

110 ----
110XVII Evidence
110XVII(T) Confessions
110k519 Voluntary Character in General
110k519(9) Questioning and Soliciting in General.

There was no clear and manifest error in determination that circumstances surrounding giving of defendant's confessions were not inherently coercive; it was not improper for officers, when explaining charges against defendant, to accurately inform him that he had been implicated in the crime by State's witness.

[4] Criminal Law ⇐517.2(1)

110 ----
110XVII Evidence
110XVII(T) Confessions
110k517.2 Absence or Denial of Counsel; Inadequate Representation
110k517.2(1) In General.

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That detective brought transcript of defendant's confession to him for his review, instead of delivering it to his attorney, was not error, where detective fully apprised defendant of his right to have counsel assist him.

[5] Criminal Law ⇐1037.1(4)

110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(4) Time for Objection.

Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error.

[6] Criminal Law ⇐713

110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 In General.

Prosecutor's remark in closing argument in regard to role of defense counsel was not fundamental error.

[7] Criminal Law ⇐824(3)

110 ----
110XX Trial
110XX(H) Instructions: Requests
110k824 Necessity in General
110k824(3) Instructions as to Grade or Degree of Offense.

In cases which may result in death penalty, trial judge is required to instruct on lesser included offenses when evidence would have supported such a verdict, regardless of whether requested to do so by defendant.

[8] Homicide ⇐308(3)

203 ----
203VIII Trial
203VIII(C) Instructions
203k306 Grade or Degree of Offense
203k308 Murder
203k308(3) Applicability to Issues and Evidence in General.

To support an instruction for second-degree murder, evidence reasonably construed should tend to show lack of premeditation.

[9] Homicide ⇐308(3)

203 ----
203VIII Trial
203VIII(C) Instructions
203k306 Grade or Degree of Offense
203k308 Murder
203k308(3) Applicability to Issues and Evidence in General.

Evidence, including proof that reason for killing was to prevent victim from pressing charges of kidnapping and rape, that codefendants knew this was the reason when they proceeded to kill her, and that choking of victim by defendant was the first of the acts in a sequence of stabbing, cutting and crushing with a rock that led to her death, was insufficient to support a claim of lack of premeditation on defendant's part so as to require giving of instruction on second-degree murder.

[10] Criminal Law ⇐413(1)

110 ----
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k413 Self-Serving Declarations
110k413(1) In General.

Exculpatory hearsay statement made by defendant to police officer was not admissible under either of the residual hearsay exceptions. 17 A A.R.S. Rules of Evid., Rules 803(24), 804(b)(5).

[11] Sentencing and Punishment ⇐1669

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1669 Extent of Offender's Personal Participation.

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(Formerly 203k357(12), 203k354)

[11] Sentencing and Punishment ⇐1681

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Commiting Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(12), 203k354)

Where trial court made specific findings that defendant and codefendant discussed killing victim, that killing commenced when defendant began strangling victim, and that defendant held victim while she was being stabbed, there was a clear finding that defendant both killed and intended to kill, and thus imposition of death penalty was not precluded under rule placing limits on imposition of death penalty based on accomplice or felony-murder theories.

[12] Sentencing and Punishment ⇐1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11), 203k354)

[12] Sentencing and Punishment ⇐1700

350H ----
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1700 In General.

(Formerly 203k357(11), 203k354)

Death penalty was properly imposed, as victim's suffering of great mental anguish and physical pain prior to her death established cruelty for purposes of statutory aggravating circumstance, and as mitigation that defendant had low intelligence, lack of prior record of serious crime, evidence suggesting remorse, his favorable adjustment to new marital and parental responsibility, and that State's key witness, who participated in crime, was granted immunity from prosecution, was not sufficiently *17 substantial to call for leniency in light of the extreme cruelty and brutality of the crime. A.R.S. § 13-703, subd. F, par. 6.

[138 Ariz. 80] *18 Robert K. Corbin, Atty. Gen. by William J. Schafer, III and Barbara A. Jarrett, Asst. Attys. Gen., Phoenix, for appellee.

Frederic J. Dardis, Pima County Public Defender by Lawrence H. Fleischman, Asst. Public Defender, Tucson, for appellant.

CAMERON, Justice.

Defendant, Robert Douglas Smith, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, kidnapping, A.R.S. § 13-1304(A)(3), and sexual assault, A.R.S. § 13-1406. In addition, the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious physical injury, A.R.S. § 13-604. Defendant was sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

II. Did the trial court lack venue over the homicide charge?

III. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

IV. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

V. Is the Arizona death penalty statute unconstitutional?

VI. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VII. Is there a right to have a jury participate in

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sentencing where the death penalty is imposable?

VIII. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

IX. Did the trial court err in placing limits on recross-examination?

[138 Ariz. 81] *19 X. Were defendant's statements voluntary?

XI. Did the prosecutor's closing argument contain fundamental error?

XII. Did the trial court err in failing to instruct the jury on second degree murder?

XIII. Did the trial court properly exclude from evidence an exculpatory hearsay statement made by the defendant to a police officer?

XIV. Is imposition of the death penalty foreclosed in this case by Enmund v. Florida?

XV. Does the court find in its independent review that the death penalty was appropriate in this case?

XVI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The first eight issues raised in this appeal have been decided and discussed in the companion case of *State v. Lambright,* 138 Ariz. 63, 673 P.2d 1 (1983) . A summary of the facts necessary for the determination of this appeal is also contained in that opinion.

IX. LIMITATION OF RECROSS-EXAMINATION

[1] Defendant asserts that the trial court erred in limiting his right to recross-examine the state's key witness, Kathy Foreman. The control of cross-examination is left to the sound discretion of the trial judge and will not be disturbed on appeal absent a showing from the record of an abuse of discretion. *State v. Thomas,* 110 Ariz. 106, 109, 515 P.2d 851, 854 (1973). Further,

> The right of confrontation and cross-examination of adverse witnesses is of fundamental importance, but it is not a right without limitation. It is well established in Arizona, as well as in many other jurisdictions, that there is no right to re-cross unless some new issue arises during redirect; otherwise, it is a matter of the trial court's sound discretion. (Citations omitted.) *State v. Jones,* 110 Ariz. 546, 550, 521 P.2d 978, 982, cert. denied 419 U.S. 1004, 95 S.Ct. 324, 42 L.Ed.2d 280 (1974), quoted in *State v. Williams,* 113 Ariz. 14, 16, 545 P.2d 938, 940 (1976).

[2] In the instant case the judge offered the defendant a full opportunity to recross-examine the witness on any new areas brought out on redirect, and because he was tried together with another defendant, he also gave him the opportunity to conduct recross on any new point opened up on cross-examination by the co-defendant. Defendant's counsel declined to specify any new areas he wished to inquire into on recross-examination, so the trial judge did not permit recross-examination to proceed.

> A party has no right to use further cross-examination to repeat or re-emphasize matters already covered on direct or cross-examination. The court may inquire into the nature and purpose of the further cross-examination to determine whether to permit it or limit its scope. *State v. Loftis,* 89 Ariz. 403, 405-06, 363 P.2d 585, 587 (1961).

We find no error.

X. VOLUNTARINESS OF STATEMENTS

[3] Robert Smith was arrested at about 9:00 a.m. on 14 March 1981 at an apartment complex in South Houston, Texas. He was arrested by officer John W. Laird of the Texas Department of Public Safety, who was accompanied by Robert Petty, another Texas DPS officer, and two South Houston policemen. Officer Laird read Smith his Miranda rights, and Smith acknowledged that he understood them. No questions were asked at the time of arrest. Smith was taken to the South Houston Police Department, and a magistrate was summoned. The magistrate advised Smith of the charges against him, and read him his constitutional rights a second time. Defendant then agreed to talk to agents Laird and Petty. The officers told him that Kathy Foreman had admitted her participation in the crimes and had implicated Smith. The officers also explained the nature of the [138 Ariz. 82] *20 charges against Smith. Smith then made his first confession. In this first statement, Smith set forth the basic facts

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surrounding this crime, including his substantial involvement in the incident. In this first statement he told authorities that Kathy Foreman was the person who actually stabbed the victim.

Officer Laird told Smith the story just did not sound right somehow, and asked if he was sure it was the truth. Smith then became somewhat emotional, and said he had lied in order to protect his friend Lambright.

He then made a second statement, which paralleled the first one except that Smith now stated it was Lambright who stabbed the victim, and that both Lambright and Foreman cut the victim's throat. After the second statement Smith asked if he could see his wife. The officers granted the request and arranged for her to come down and see him. He visited with his wife and her mother for approximately an hour. The officers went in and out of the room several times as they got food and beverages for themselves and Smith. The officers testified that while they were in the room the defendant and his wife were talking about religion, and they observed the defendant crying.

After seeing his wife, Smith met with Laird and Petty again, and gave them a third statement which was similar to the second statement, but which was far more detailed. The defendant also expressed a willingness to give a written statement. Two days later he did give a written statement to the Texas authorities, after being given another set of constitutional warnings.

Defendant's final statement was made in Arizona to detective Gary Dhaemers of the Pima County Sheriff's Department. He agreed to answer questions in a taped interview. A transcript was made of the interview, which the defendant was given the opportunity to review, correct, and sign. The trial judge found that each of Smith's confessions was voluntary and admissible.

As we noted in *State v. Lambright,* supra, filed this date,

> The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at "voluntariness" hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal, absent clear and manifest error. (Citations omitted.) *State v. Arnett,* 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), quoted in *State v. Osbond,* 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). *Accord State v. Dalglish,* 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982).

No clear and manifest error is present in the instant case. We do not find the circumstances surrounding the giving of these confessions to have been inherently coercive. Nor do we find it was improper, as suggested by defendant, for the officers, when explaining the charges against Smith, to accurately inform him that he had been implicated in the crime by Foreman.

[4] Defendant further alleges as specific error the fact that detective Dhaemers brought the transcript of the last confession directly to Smith for his review, instead of delivering it to his attorney. It is apparent, however, that when Dhaemers delivered the transcript to Smith for his corrections and signature, he fully apprised the defendant of his right to have counsel assist him. In officer Dhaemers' uncontradicted testimony, he stated:

> Well, I had gone through [the transcript] as best I could, and then I took it over to the jail and asked Mr. Smith if he wanted the opportunity to go through the transcript of the tape that he had given to me.
>
> He indicated that he did. He wanted to go through it.
>
> I advised him he had the right to have an attorney with him. He already had an attorney appointed to him and if he wanted that attorney there, he could have him there before we went through the statement and reviewed it.
>
> [138 Ariz. 83] *21 He indicated to me that his attorney said that--had told him not to talk to anybody, but he wanted to talk to us and he wanted to go through his statement, his attorney would be mad at him because he did this, but he wanted to do this anyway.

This is not a case in which the police resorted to subterfuge in an attempt to deprive the defendant of his right to counsel, *See Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964). Here it is clear Smith was offered the assistance of his appointed counsel to review the transcript, and he validly waived it. Nor is this a

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case in which the defendant ever invoked his right to have counsel present during questioning, or expressed his desire to deal with the police only through counsel. *See Edwards v. Arizona*, 451 U.S. 477, 484-85, 101 S.Ct. 1880, 1884-85, 68 L.Ed.2d 378, 386 (1981). In any event, we also note that the defendant made only minor typographical changes to the draft in question, which would have been admissible with or without defendant's corrections and signature, and which was cumulative of numerous other valid confessions. We find no error.

XI. PROSECUTORY CLOSING REMARKS

The defendant raises on appeal the following remark made by the prosecutor in his closing argument, in regard to the role of defense counsel. The prosecutor stated:

> Looking at joos, Mr. Hippert's job was to get his client off. That's it. My job is to produce this evidence and argue from it and ask you to convict for a crime which Mr. Smith should not be let go. Mr. Hippert is asking you to let him go, to let him walk out of the courtroom after being involved in the things he did.

This remark was made in response to the following statement in defense counsel's closing argument:

> Now [the prosecutor], when he was standing up here said that your job or your purpose is to apply the law to the case.
>
> Well, his job is to make things easy for the government, to grease the wheels * * *.

[5] Opposing counsel must timely object to any erroneous or improper statements made during closing argument or waive his right to the objection, except for fundamental error. *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1978); *accord State v. Young*, 116 Ariz. 385, 386, 569 P.2d 815, 816 (1977) ("failure to object to a closing argument is a waiver of any right to review an appeal unless so prejudicial as to deny the defendant a fair trial.") It is also apparent that any error was invited by defendant. As we said in *State v. Marvin*, 124 Ariz. 555, 558, 606 P.2d 406, 409 (1980),

> We have recognized that improper remarks by the prosecution, if they are provoked by opposing counsel or are in retaliation for certain statements, are not grounds for reversal unless they are so prejudicial as to constitute reversible error. (Citations omitted.)

See also State v. Bowie, 119 Ariz. 336, 343, 580 P.2d 1190, 1197 (1978) ("In this case, the error, if any, in the prosecutor's comments, was invited by the defense counsel's closing argument. The appellant may not benefit from an error which he invited."); *accord, State v. Purcell*, 117 Ariz. 305, 308, 572 P.2d 439, 442 (1977). Thus under both the waiver and invited error doctrines, the above comments of the prosecutor do not require reversal unless they constitute fundamental error.

[6] We are unable to find that the remark by the prosecutor in the instant case constitutes fundamental error. This remark was not of a highly prejudicial nature, so likely to inflame or bias the jury as to deny defendant his right to a fair trial. Even under the higher standard of scrutiny applied in cases where the question of a prosecutor's allegedly improper comment has been properly preserved for appeal, we would be unable to say this comment "probably influenced the jury's verdict." See *State v. Sullivan*, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981), quoting *State v. Sustaita*, [138 Ariz. 84] *22 119 Ariz. 583, 594, 583 P.2d 239, 250 (1978). We find no reversible error.

XII. FAILURE TO INSTRUCT ON SECOND DEGREE MURDER

[7] The defendant asserts that the trial court erred in failing to instruct the jury on second degree murder. In cases which may result in the death penalty, the trial judge is required to instruct on lesser included offenses when the evidence would have supported such a verdict, regardless of whether requested to do so by the defendant. *State v. Vickers*, 129 Ariz. 506, 513, 633 P.2d 315, 322 (1981), *citing to Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). The defendant argues that parts of his confession could have been interpreted to suggest a lack of premeditation by him, and thus the evidence could have supported a verdict of second degree murder. The trial judge apparently felt the confessions fairly read did not tend to negate the element of premeditation, as he rejected this argument and refused the instruction.

[8][9] To support an instruction for second degree murder, the evidence reasonably construed "should tend to show lack of premeditation." *State v. Moreno*, 128 Ariz. 257, 261, 625 P.2d 320, 324 (1981). All of the relevant evidence at trial suggests that the kidnapping was still in progress at the time of the killing; there was no suggestion that Ms. Owen was free to leave at the time Smith began choking her. Furthermore, the uncontradicted evidence before the jury, including Smith's own statements, established that the reason for the killing was to prevent Ms. Owen from pressing charges of kidnapping and rape, and that the co-defendants knew this was the reason when they proceeded to kill her. The choking of Ms. Owen by Smith was the first of the acts in the sequence of stabbing, cutting and crushing with a rock that led to her death. Under these circumstances, we do not believe that the evidence supports a claim of lack of premeditation on Smith's part. We hold that the trial court did not abuse its discretion in refusing the requested instruction.

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XIII. HEARSAY STATEMENT TO OFFICER

Defendant argues that it was error for the court to refuse to admit into evidence an exculpatory hearsay statement made by the defendant to a police officer. Defendant suggests that the statement is admissible under either of the residual hearsay exceptions, Rules 803(24) and 804(b)(5), Arizona Rules of Evidence, 17A A.R.S.

[10] Each of those residual exceptions require the out of court statement to have "equivalent circumstantial guarantees of trustworthiness" as the other stated hearsay exceptions. *Id.* In *State v. Spratt*, 126 Ariz. 184, 187, 613 P.2d 848, 851 (App.1980), our Court of Appeals held that a defendant's out of court assertion of his innocence lacked equivalent sufficient circumstantial guarantees of trustworthiness to make it admissible under the residual exception of Rule 803(24), and therefore the statement was properly excluded. Similarly in *State v. Duffy*, 124 Ariz. 267, 275, 603 P.2d 538, 546 (App.1979), the court held that the trustworthiness of defendant's self-serving out of court statements was "highly suspect," and therefore the trial court properly denied their admissibility. In the instant case the trial judge specifically stated as the reason for his ruling,

> * * * I'm going to deny the admission under either Exception 5 to Rule 804 or Exception 24 to Rule 803 on the grounds that it does not have the circumstantial guarantees of trustworthiness [or] that it is a statement sufficiently against his interest to bring it within the ambit of the rule.

We find no error.

XIV. PROPRIETY OF SENTENCE UNDER *ENMUND v. FLORIDA*

The defendant claims that the death penalty is impermissible in this case under the rule announced in *Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which places limits on the imposition of the death penalty based on accomplice or felony murder theories. The United States [138 Ariz. 85] *23 Supreme Court held in Enmund that imposition of the death penalty would violate the Eighth and Fourteenth Amendments where the defendant did not kill, attempt to kill, or intend to kill. Defendant argues that because his case was submitted on both premeditation and felony murder theories, the jury's verdict of guilty of first degree murder does not establish that he killed, attempted to kill, or intended to kill.

In *State v. McDaniel*, 136 Ariz. 188, 199, 665 P.2d 70, 81 (1983), we stated,

> We agree with the defendant's claim that in first degree murder cases where the jury is instructed on felony murder as well as premeditated murder, a general verdict finding the defendant guilty of first degree murder does not establish whether the defendant had in fact killed, attempted to kill, or intended to kill.

In order to insure compliance with the specific requirements of *Enmund*, we instructed our trial courts,

> * * * that in future cases where the jury might have found the defendant guilty of first degree murder based on a felony-murder theory, the trial judge must determine beyond a reasonable doubt prior to imposing a sentence of death that the defendant killed, attempted to kill or intended to kill. *Id.* at 199, 665 P.2d at 81.

Although the trial in this case took place prior to *State v. McDaniel*, supra, the trial judge made findings in his Special Verdict of the type contemplated in that opinion. The trial judge held,

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THE COURT DOES FIND BEYOND A REASONABLE DOUBT THAT THE DEFENDANT, ROBERT DOUGLAS SMITH, COMMITTED THE OFFENSE OF MURDER WITH * * * PREMEDITATION.

THE COURT FURTHER FINDS while this defendant was legally accountable for the conduct of another under the provisions of A.R.S. 13-303, this defendant's participation was not min[o]r, but was MAJOR and that in addition thereto, that this defendant planned and premeditated the killing and consummated the act. * * *

THE COURT FURTHER FINDS that this defendant did foresee that his conduct would cause the death of another person; that he deliberately intended to cause that death. * * * (Emphasis in original.)

[11] The trial court clearly found that defendant both killed and intended to kill. The trial judge made specific findings that Smith and Lambright discussed killing the victim, that the killing commenced when Smith began strangling the victim, and that Smith held the victim while she was being stabbed. We have reviewed the record and find the evidence supports these findings. Because the defendant participated in the killing, and intended to kill, the death penalty is not impermissible under *Enmund v. Florida*, supra.

XV. INDEPENDENT REVIEW

In each death penalty case we conduct an "independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances [,]" and then "determine for ourselves if the latter outweigh the former when we find both to be present." *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976) (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976).

[12] For the reasons stated today in *State v. Lambright*, we agree with the trial court that the aggravating circumstance set out in A.R.S. § 13-703(F)(6) was established, as the offense was committed in an especially cruel manner. The victim was made to suffer great mental anguish and physical pain prior to her death. Defendant Smith shares full responsibility for the cruelty toward Ms. Owen. In fact, he was the one who repeatedly raped the victim prior to murdering her. Cruelty was clearly established.

The evidence suggesting Smith also had a heinous and depraved attitude toward the crime is equivocal. The only evidence of a heinous and depraved attitude on the part of Smith was the uncorroborated testimony of Kathy Foreman that Smith was the person[138 Ariz. 86] *24 who requested that the tape "We Are the Champions" be played. Although admitting much of his participation in the crime, Smith denied this. On the other hand, there is evidence that Robert Smith tried to commit suicide soon after returning to Texas, both as a result of remorse over this crime, and a marital breakup prior to the trip. We find that the evidence presented does not establish beyond a reasonable doubt that Smith had a heinous and depraved attitude toward the crime.

The principal mitigation urged by defendant was minor participation in the crime. This assertion was rejected by the trial court, and is also rejected by this court, for the reasons stated in the previous discussion regarding *Enmund v. Florida*. He further argues that the giving of a felony murder instruction in this case should be considered as mitigating. "The giving of a felony murder instruction is a mitigating circumstance only where there is some doubt as to defendant's specific intent to kill the victim. *State v. Schad*, 129 Ariz. 557, 574, 633 P.2d 366, 383 (1981), cert. denied 455 U.S. 983, 102 S.Ct. 1492, 71 L.Ed.2d 693 (1982)." *State v. Gillies*, 135 Ariz. 500, 513, 662 P.2d 1007, 1020 (1983). *Accord State v. Zaragoza*, 135 Ariz. 63, 70, 659 P.2d 22, 29 (1983). This asserted mitigation therefore does not apply to this defendant.

There was some testimony from family members that the defendant had polio as a small child which may have caused him some physical and brain damage, although the statutory mitigating circumstance of A.R.S. § 13-703(G)(1), substantial impairment of mental capability to appreciate wrongfulness of conduct or to conform conduct to the law, was not established in this case. The court does take notice that the defendant has a low intelligence; the last time his I.Q. was tested before he left school it measured seventy one, or approximately at the second percentile. Some of the testimony also suggested a troubled home life as a youth, and learning difficulties in school.

The court has also considered his lack of prior record of serious crime, the evidence suggesting

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remorse by defendant, his favorable adjustment to a new marital and parental responsibility in the months preceeding his arrest, and the treatment accorded Kathy Foreman as further mitigation.

Having considered all the mitigation presented, we find that although it is significant, it is not sufficiently substantial to call for leniency in light of the extreme cruelty and brutality of the instant crime. The death penalty was properly imposed in this case.

XVI. PROPORTIONALITY REVIEW

In cases where the death penalty is imposed we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendants." *State v. Richmond*, supra, 114 Ariz. at 196, 560 P.2d at 51.

For the reasons stated in *State v. Lambright*, we find that the disposition accorded Kathy Foreman, although disturbing, is not alone sufficient to require reversal of defendant's sentence.

This court must also look to the disposition of persons involved in other similar crimes. For the reasons stated in *State v. Lambright*, we find the disposition in this case to be proportional to the disposition of the following similar cases in which the death penalty was imposed, *State v. Jeffers*, 135 Ariz. 404, 661 P.2d 1105 (1983); *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980); *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980); *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978); and not inconsistent with the following cases in which leniency was granted, *State v. McDaniel*, 136 Ariz. 188, 665 P.2d 70 (1983); *State v. Graham*, 135 Ariz. 209, 660 P.2d 460 (1983); *State v. Valencia*, 132 Ariz. 248, 645 P.2d 239 (1982); *State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981); *State v. Brookover*, 124 Ariz. 38, 601 P.2d 1322 (1979). Again, we believe that overall the penalty imposed in this case is proportional to the penalty imposed in similar crimes.

[138 Ariz. 87] *25 We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS, J., concur.

FELDMAN, Justice, concurring in part; dissenting in part.

I concur in the portion of the opinion affirming the conviction. My views on the use of dual juries are contained in my concurrence to *State v. Lambright*, 138 Ariz. 63, 673 P.2d 1 (1983).

I dissent from that portion of the opinion affirming defendant's sentence to death. The trial court found that Smith was a participant in the killing. However, the record indicates and the majority acknowledges that it was Lambright who used the knife and it was Lambright who "finished off" the victim by hitting her over the head with a rock. Smith claims that his participation in the act of murder was only minor and that the killing was done by Lambright and Kathy Foreman.

The trial court's findings are contrary to Smith's contentions. The trial court found beyond reasonable doubt that Smith, with premeditation, participated in the killing, that he helped to plan it, and that his participation in the actual act of murder "was MAJOR." (Emphasis in original.) Ordinarily, if the trial judge's findings are supported by the evidence we could affirm or, in a capital case where we are making an independent review, we could agree. I cannot agree in this case. On this record, the trial court's findings are necessarily based upon the testimony of Kathy Foreman. Evidently the trial judge believed her testimony. He certainly had a better opportunity than I to determine the credibility. It may well be that she told the truth. However, her motives for lying are clear. By testifying that both Lambright and Smith planned and took a major part in the crime, she has seen to their conviction and to the imposition of the ultimate sentence. By doing this, she has earned immunity for herself, avoided the death penalty, and has not served even a day in jail.

The trial judge and the members of this court are "disturbed" and "appalled" by the treatment afforded Ms. Foreman. I join them in this. I am also appalled, however, by the fact that in the face of the many mitigating circumstances detailed by the court, including his low I.Q., Smith has been sentenced to death on the uncorroborated testimony of a witness

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whose motive for lying is patent. If the testimony given by Kathy Foreman is true, then Smith merits the death penalty. If, however, Kathy Foreman did not tell the truth, Smith does not merit the death penalty. No member of the majority has ever seen Kathy Foreman, but each member of the majority recognizes her motive to lie and each member of the majority is appalled. In my view, no decision on life or death should be allowed to stand on so frag a foundation. For this reason, I believe that the court should exercise its discretion in performing i duty of independent review by reducing Smith's sentence to life without possibility of parole for 25 years.

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BEST AVAILABLE

APPENDIX F

*1 673 P.2d 1

138 Ariz. 63, 41 A.L.R.4th 1165

Supreme Court of Arizona,
In Banc.

STATE of Arizona, Appellee,
v.
Joe Leonard LAMBRIGHT, Appellant.

No. 5594.
Sept. 28, 1983.

Defendant was convicted in the Superior Court, Pima County, Cause No. CR-05669, Michael J. Brown, J., of first-degree murder, kidnapping and sexual assault, and he appealed. The Supreme Court, Cameron, J., held that: (1) use of single-trial "dual jury" procedure was not authorized, but was not reversible error; (2) venue was proper, notwithstanding that murder was committed elsewhere; (3) there was no clear and manifest error in deciding that defendant's statements were voluntary and not coerced; (4) it was not error to allow member of prosecutor's office to testify regarding grant of immunity to an accomplice; and (5) imposition of death sentence was proper.

Affirmed.

Feldman, J., filed specially concurring opinion.

West Headnotes

[1] Criminal Law ⇐622

110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k622 Joint or Separate Trials of Codefendants.

(Formerly 110k618)

[See headnote text below]

[1] Criminal Law ⇐1166(1)

110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(1) In General.

Use of single-trial "dual jury" procedure in prosecution of defendant and codefendant, while not authorized by the Supreme Court, was not reversible error, as defendant could point to no specific error occurring at trial, and as such procedure was not inherently prejudicial.

[2] Criminal Law ⇐112(1)

110 ----
110IX Venue
110IX(A) Place of Bringing Prosecution
110k112 Offenses Committed Partly in One County and Partly in Another
110k112(1) In General.

Venue was proper on homicide charge, where underlying felonies of kidnapping and sexual assault were elements of first-degree murder charge, kidnapping of victim originated in county of venue, and evidence supported conclusion that initial sexual assault occurred while defendants were still in that county, notwithstanding that murder occurred elsewhere. A.R.S. §§ 13-109, 13-1105, 13-1301, subd. 2(a).

[3] Criminal Law ⇐412.1(4)

110 ----
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(4) Interrogation and Investigatory Questioning.

Trial court was not clearly and manifestly in error in determining that defendant's interviews with police were not inherently coercive, where defendant was not questioned until after he was transported to sheriff's office, he was then booked and permitted to make phone calls, he spoke to two officers for approximately 45 minutes beginning at 10:15 a.m., and then spoke to another officer for another 45 minutes, and during such period defendant was not handcuffed, and was permitted to smoke cigarettes and drink coffee.

[4] Criminal Law ⇐412.1(1)

110 ----
110XVII Evidence

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110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) In General.

There was no clear and manifest error in conclusion that statements made by defendant to police were voluntarily given, in view of specific denial by police officers who rode in car with defendant that one of the officers conspicuously displayed a gun and said that it could make a big hole in a person, denial by arresting officers that they overheard any phone conversation of defendant in which he asked his sister and his boss to arrange to get him a lawyer, denial by officer that at beginning of interview defendant stated that he thought he should talk to an attorney, and denial by officers that they alluded to another case involving multiple defendants and stated that first person to confess got a better deal.

[5] Criminal Law ⇐412.1(1)

110 ----
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.1 Voluntary Character of Statement
110k412.1(1) In General.

Statement by defendant to homicide detective that "I probably owe you a complete confession" was a spontaneous remark which was unsolicited and clearly voluntary, and thus was admissible.

[6] Witnesses ⇐318

410 ----
410IV Credibility and Impeachment
410IV(A) In General
410k318 Corroboration of Unimpeached and Uncontradicted Witness.

Admission of testimony by a member of prosecutor's office who was not prosecuting instant case, that story of State's witness who was granted immunity from prosecution never varied in its particulars before and after she was granted immunity, was not error, as jury was able to place such testimony in context, and to accord it appropriate weight, notwithstanding that State's witness was an interested witness.

[7] Criminal Law ⇐741(1)

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) In General.

[See headnote text below]

[7] Criminal Law ⇐742(1)

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k742 Credibility of Witnesses
110k742(1) In General.

Credibility of a witness and weight and value to be given her testimony are questions for trier of fact.

[8] Criminal Law ⇐741(1)

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k741 Weight and Sufficiency of Evidence in General
110k741(1) In General.

[See headnote text below]

[8] Criminal Law ⇐742(1)

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k742 Credibility of Witnesses
110k742(1) In General.

Weight and credibility to be accorded to witnesses who are involved in upholding the law are jury matters.

[9] Witnesses ⇐70

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410 ----
410II Competency
410II(A) Capacity and Qualifications in General
410k69 Judges, Jurors, and Judicial Officers, as Witnesses as to Proceedings by or Before Them
410k70 In General.

Fact that witness, who testified that story of State's witness, who was granted immunity from prosecution, had not varied in its particulars before and after being granted immunity, was a member of the prosecutor's office did not render that testimony inadmissible, where witness was not the prosecutor who was trying the case.

[10] Criminal Law ⇐770(3)

110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k770 Issues and Theories of Case in General
110k770(3) Requisites and Sufficiency.

[See headnote text below]

[10] Criminal Law ⇐814(3)

110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k814 Application of Instructions to Case
110k814(3) Matters Not Sustained by Evidence in General.

Failure to *1 give instructions which are not correct statements of the law or do not fit facts of particular case is not error.

[11] Criminal Law ⇐798(.5)

110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k798 Manner of Arriving at Verdict
110k798(.5) In General.

(Formerly 110k798)

Defendant's proffered instruction that jury must consider charge against each defendant separately was an incorrect statement of law given single-trial "dual jury" procedure used in case, and therefore was properly refused.

[12] Sentencing and Punishment ⇐1624

350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1624 Provision Authorizing Death Penalty.

(Formerly 110k1213.2(2))

Arizona death penalty statute is not unconstitutional as cruel and unusual punishment contrary to Eighth Amendment. A.R.S. § 13-703; U.S.C.A. Const.Amend. 8.

[13] Homicide ⇐341

203 ----
203X Appeal and Error
203k333 Harmless Error
203k341 Failure or Refusal to Give Instructions.

Statutory aggravating circumstance that killing was in an especially heinous, cruel or depraved manner was not unconstitutionally vague. A.R.S. § 13-703, subd. F, par. 6.

[14] Criminal Law ⇐749

110 ----
110XX Trial
110XX(F) Province of Court and Jury in General
110k733 Questions of Law or of Fact
110k749 Extent of Punishment.

Defendant did not have right to have jury participate in sentencing, notwithstanding that death penalty was a possible outcome.

[15] Constitutional Law ⇐270(1)

92 ----
92XII Due Process of Law

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92k256 Criminal Prosecutions
92k270 Judgment and Sentence
92k270(1) In General.

[See headnote text below]

[15] Sentencing and Punishment ⚖206

350H ----
350HII Sentencing Proceedings in General
350HII(A) In General
350Hk203 Constitutional, Statutory and Other Regulatory Provisions
350Hk206 Validity.

(Formerly 110k1206.1(1))

Placing burden of proof on defendant to prove mitigating circumstances in sentencing determination did not violate due process. A.R.S. § 13-703, subd. C; U.S.C.A. Const.Amends. 5, 14.

[16] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11), 203k354)

Evidence, including proof that victim was abducted and driven away from city in which she was picked up by her captors, she was described as being scared and trembling as she sat in backseat of car, during drive she was sexually assaulted, she was then taken to an isolated location and placed in obvious fear for her life, as evidenced by her asking her captors if they intended to let her go, and was then sexually assaulted a second time before being killed, supported finding of aggravating circumstance of cruelty, that is, murder was committed in a cruel manner, based on great degree of mental pain inflicted on victim during course of crime. A.R.S. § 13-703, subd. F, par. 6.

[17] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11), 203k354)

Where victim was choked and then stabbed in chest and abdomen, knife was twisted and turned while it was inside her, her throat was then cut deeply, she remained alive and was still conscious as she raised herself up on one elbow when her assailants turned to leave, and then defendant returned and threw large boulder down on her head, statutory aggravating element of cruelty, for purposes of aggravating circumstance that murder was committed in an especially cruel manner, was established. A.R.S. § 13-703, subd. F, par. 6.

[18] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11), 203k354)

Concepts of heinous and depraved, for purposes of aggravating circumstance that murder was committed in an especially heinous, cruel, or depraved manner, go to mental state and attitude of perpetrator as reflected in his words and actions. A.R.S. § 13-703, subd. F, par. 6.

[19] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11), 203k354)

Evidence, including proof that when defendant was arrested one year after murder he was wearing a necklace with a charm that had belonged to victim, that when authorities inquired about the charm, defendant told them he kept it as a memento of the trip, plus proof that defendant participated in celebration of killing during which group played song "We Are the Champions," supported finding that defendant had a heinous and depraved attitude during the crime, thereby establishing that

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aggravating circumstance. A.R.S. § 13-703, subd. F, par. 6.

[20] Sentencing and Punishment ⚖1655

350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 Sentence or Disposition of Co-Participant or Codefendant.

(Formerly 203k357(4), 203k354)

[20] Sentencing and Punishment ⚖1661

350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 Determinations Based on Multiple Factors.

(Formerly 203k357(4), 203k354)

[20] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(4), 203k354)

Where evidence supported aggravating circumstance that murder was committed in an especially heinous, cruel, or depraved manner, based on findings of cruelty relative to both great mental pain inflicted on victim during course of murder and victim's suffering of great physical pain during murder itself, and that defendant had a heinous and depraved state of mind, imposition of death penalty was proper, notwithstanding that in mitigation defendant presented a lack of record of prior violent crime, honorable discharge from military, an asserted unsettled family life as a child, and fact that State's witness who purportedly participated in murder was granted immunity for her testimony. A.R.S. § 13-703, subds. E, F, par. 6.

[21] Sentencing and Punishment ⚖1655

350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 Sentence or Disposition of Co-Participant or Codefendant.

(Formerly 203k356, 203k354)

That State's witness received immunity in return for her testimony against defendant did not create a disproportionate result so as to preclude imposition of death sentence on defendant for murder, as codefendant received same sentence received by defendant.

[22] Sentencing and Punishment ⚖38

350H ----
350HI Punishment in General
350HI(B) Extent of Punishment in General
350Hk38 Proportionality to Offense.

(Formerly 110k1208.1(2))

While disposition of other persons involved *1 in crime is an important factor in determining proportionality of capital sentence, court must also consider propriety of sentence in relation to disposition of persons involved in other similar crimes.

[23] Sentencing and Punishment ⚖1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(4), 203k354)

Death sentence received by defendant was proportional to disposition of persons involved in crimes involving same aggravating circumstance, that murder was committed in an especially heinous, cruel or depraved manner, and was not disproportionate to other cases in which it was held that leniency was appropriate in light of the more compelling mitigating circumstances than were present in instant case. A.R.S. § 13-703, subd. F, par. 6.

[24] Sentencing and Punishment ⚖1655

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350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1655 Sentence or Disposition of Co-Participant or Codefendant.

(Formerly 110k983)

Favorable treatment accorded to an accomplice can, under certain circumstances, be given weight in considering proportionality of capital sentence.

[138 Ariz. 65] *3 Robert K. Corbin, Atty. Gen. by William J. Schafer, III and Barbara A. Jarrett, Asst. Attys. Gen., Phoenix, for appellee.

Thomas G. Martin, Tucson, for appellant.

CAMERON, Justice.

Defendant, Joseph Leonard Lambright, was tried before a jury and convicted of first degree murder, A.R.S. § 13-1105, kidnapping, A.R.S. § 13-1304(A)(3), and sexual assault, A.R.S. § 13-1406. In addition, the kidnapping and sexual assault were found to have been dangerous felonies, involving the infliction of serious physical injury, A.R.S. § 13-604. Defendant was sentenced to death for the murder, to 21 years imprisonment for the kidnapping, and to 21 years imprisonment for the sexual assault, to be served consecutively to the sentence for kidnapping. The case was automatically appealed to this court pursuant to Rules 26.15, 31.2(b), Arizona Rules of Criminal Procedure, 17 A.R.S.; we have jurisdiction pursuant to Art. 6, § 5(3) of the Arizona Constitution, and A.R.S. §§ 13-4031 and 13-4035.

The issues we must decide on appeal are:

I. Does the use of a dual jury procedure at trial constitute reversible error?

[138 Ariz. 66] *4 II. Did the trial court lack venue over the homicide charge?

III. Were defendant's statements voluntary?

IV. Was it error to allow an official of the Pima County attorney's office to testify regarding the grant of immunity to an accomplice?

V. Did the trial court err in failing to give one of the defendant's proffered jury instructions?

VI. Is the Arizona death penalty statute unconstitutional?

VII. Is the statutory aggravating circumstance of killing in an "especially heinous, cruel, or depraved manner" unconstitutionally vague?

VIII. Is there a right to have a jury participate in sentencing where the death penalty is imposable?

IX. Is it unconstitutional to place the burden of proof of mitigating circumstances on the defendant?

X. Does this court find in its independent review that the death penalty was appropriate in this case?

XI. Is the death penalty in this case proportionate to the disposition of other similar cases?

The facts necessary to a determination of this appeal are as follows. In February and March, 1980, Joseph Lambright, Robert Smith, a friend of Lambright's, and Kathy Foreman, Lambright's girlfriend, took a cross country driving trip. Beginning in Texas, where they resided, they first drove to Florida, returned to Texas, and continued on to Arizona. The trip was financed with muggings or purse-snatching and some occasional work. During the trip Lambright and Foreman were sexually involved, and frequently had intercourse in Smith's presence; sometimes this occurred in the car while Smith was driving.

When the group arrived in Arizona, they camped in the mountains outside Tucson. Lambright and Foreman again engaged in intercourse in the presence of Smith, and Smith became angry. He complained that Lambright had all the sex he wanted. Lambright asked why Smith "didn't go out and find somebody." Smith said it "wasn't so easy" and began walking off. The two men then walked away together and talked for several minutes.

The next day, 11 March 1980, the three went into Tucson and were having coffee at a Hobo Joe's restaurant, when Smith once again indicated he wanted a woman. At this point Foreman left to use the restroom. As she was returning, she testified that she overheard Lambright saying to Smith that Lambright "would like to kill somebody just to see if he could do it." When Foreman inquired moments later what was going on, Lambright told her that they were going to go out and find somebody for Smith.

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Lambright drove the group around Tucson for some time, and at approximately 3:30 p.m. they saw a young woman, the victim Sandy Owen, hitchhiking. They stopped and picked up the victim, who seated herself in the unoccupied back seat and said she wanted a ride to the food stamp office. They drove to the food stamp office, but when they arrived there they did not permit Ms. Owen to leave the car. Instead Lambright drove to the back of the building, got out of the car and jumped into the back seat with Ms. Owen. He told her to "shut up and be quiet and she wouldn't get hurt."

Smith got out of the front passenger's seat and into the driver's seat. He pulled the car away and began looking for the freeway. Foreman turned around and saw that the victim looked frightened, and appeared to be trembling. Foreman asked the victim how to get to the interstate. Smith told the victim to shut up, because she would not tell them the truth. They found Interstate 10, and proceeded northwest toward California. Lambright searched through the victim's purse, found a bottle of pills, and asked what they were for. The victim stated they were part of a mental therapy she was undergoing.

[138 Ariz. 67] *5 At some point Owen stated that she needed to use a restroom. They pulled the car off to the side of the interstate, and told her she could relieve herself behind some trees. Lambright had the victim take her shoes off so she would be unable to get away, and had Kathy Foreman accompany her to make sure she did not try to run. The group got back into the car, now with Lambright driving and Smith in the back seat. Smith put a blanket and some clothes over the rear windows, and proceeded to rape the victim. When he had finished he snickered and said she had small breasts.

The car proceeded through Pinal County, turned off the interstate, and proceeded to some isolated mountains. Ms. Owen asked if her captors were going to release her, and they told her they would take her back and let her go. They left the car at the end of a dirt road and walked part way up one of the mountains to a level area, arriving near dusk. After building a fire, Lambright and Foreman had intercourse, and a few feet away Smith again raped the victim.

Smith then began choking Ms. Owen. She collapsed, and Smith retained his grip on her as she fell. Lambright stated the woman had to be killed, or else she could press charges for kidnapping and rape. Lambright took Foreman's knife out of its sheath and began stabbing the victim in the chest and abdomen, twisting the knife around inside of her. Smith held one of the victim's arms while she was being stabbed, and Foreman held the other arm. Foreman testified that after the stabbing Smith unsuccessfully tried to break Ms. Owen's neck by twisting her head. Then Lambright, Foreman or both began cutting deeply into the victim's neck with the knife; Foreman claimed that only Lambright cut the victim's neck, Smith claimed that it was done by both Lambright and Foreman, and Lambright claimed he could not remember who used the knife during the killing. The victim remained alive, and was at least semi-conscious, as she attempted to raise herself up on one arm. Lambright picked up a large rock and hurled it at her head. Foreman testified that as he threw the rock he yelled "Die, bitch."

Jewelry was taken from the victim's body, and then rocks were piled on top of her. Lambright, Smith, and Foreman returned to the car and washed the blood off their hands. As they got back into the car and began driving to San Diego, the group engaged in a macabre celebration, playing a tape of music entitled "We Are the Champions." When they arrived in San Diego, they pawned a wedding ring belonging to Ms. Foreman. They continued on to Anaheim, California, to Las Vegas, Nevada, and then returned to Texas, where they were apprehended approximately a year later after a tip to police from someone who had been told about the crime. Each of the three persons made statements to the police.

The Pima County Attorney's Office decided to charge Lambright and Smith for their participation in the crimes, and to grant immunity to Foreman in return for her testimony. Lambright and Smith were extradited to Pima County and tried for kidnapping, sexual assault, and first degree murder. The case was assigned to the Honorable Michael V. Brown of the Pima County Superior Court. In light of the defendants' confessions, which were not totally interlocking, and the appearance of potentially antagonistic defenses, Judge Brown severed the cases of Lambright and Smith. Because most of the evidence was relevant to both

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defendants, however, the judge decided to hold a single "dual jury" trial, in which two separate juries were empaneled, each to decide the guilt or innocence of only one defendant, and each permitted to hear only evidence admissible against that one defendant. The defendants were each convicted of first degree murder, kidnapping, and sexual assault, and both appeal their convictions and sentences. We examine Robert Smith's convictions and sentences in *State v. Smith* , filed this day, 137 Ariz. ---, 673 P.2d 17. In the instant case we consider the convictions and sentences of Joseph Lambright.

I. DUAL JURIES

In the pre-trial stages it appeared to the trial judge that this case could present [138 Ariz. 68] *6 problems under the doctrine of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). *Bruton* prohibits the introduction of a defendant's statements to incriminate a codefendant in a joint trial, where the declarant is unavailable for cross-examination due to the assertion of his fifth amendment right to silence. In the instant case, the state intended to use statements of both Smith and Lambright at trial, and each of these statements incriminated both the declarant and the codefendant. Moreover, although the statements were substantially "interlocking," which might have allowed their admission under the exception to *Bruton* created in *Parker v. Randolph*, 442 U.S. 62, 99 S.Ct. 2132, 60 L.Ed.2d 713 (1979), the confessions did not overlap in all respects. After considering the confessions, and finding it impractical to attempt to edit out the portions incriminating the other defendant, the trial judge decided to sever the two cases. *See* Rule 13.4, Arizona Rules of Criminal Procedure, 17 A.R.S. However, because most of the evidence was admissible against both defendants, and because the trial was expected to last over a week and included several out-of-state witnesses, rather than hold separate trials the judge decided to conduct a single trial using two juries.

Under this "dual jury" procedure, two juries were chosen from separate venires, each to decide the guilt or innocence of only one defendant. The trial was held in a courtroom in the federal courthouse in Tucson which was large enough to accommodate both juries. The two juries were kept physically separated, and were carefully instructed not to speak with persons on the other jury. When information relevant to both defendants was being presented, both juries remained in the courtroom. When evidence admissible against only one defendant was being presented, the jury for the other defendant was excused. When both juries were present, one sat in the jury box and the other sat in designated rows of chairs on the other side of the courtroom. The positions of the respective juries were alternated daily. Separate opening and closing arguments were made, each in front of one jury only. The juries were given separate instructions, and then sent to deliberate separately. When the first jury reached a verdict, it was not made public until the deliberations of the other jury had concluded. In the instant case both defendants were convicted on all counts, and each defendant assigns as error the use of the dual jury procedure.

It appears that a number of courts have approved the dual jury procedure. *See, e.g. United States v. Hayes*, 676 F.2d 1359, 1366-67 (11th Cir.), cert. denied 459 U.S. 1040, 103 S.Ct. 455, 74 L.Ed.2d 608 (1982); *United States v. Rimar*, 558 F.2d 1271 (6th Cir.), cert. denied sub nom. *Rimar v. United States*, 435 U.S. 922, 98 S.Ct. 1484, 55 L.Ed.2d 515 (1978); *United States v. Rowan*, 518 F.2d 685, 689-90 (6th Cir.), cert. denied sub nom. *Jackson v. United States*, 423 U.S. 949, 96 S.Ct. 368, 46 L.Ed.2d 284 (1975); *People v. Wardlow*, 118 Cal.App.3d 375, 382-387, 173 Cal.Rptr. 500, 502-05 (1981); *People v. Brooks*, 92 Mich.App. 393, 285 N.W.2d 307 (1979). These cases generally find that this procedure satisfies the defendants' constitutional rights as well as the end of judicial economy. *See also United States v. Sidman*, 470 F.2d 1158 (9th Cir.1972), cert. denied 409 U.S. 1127, 93 S.Ct. 948, 35 L.Ed.2d 260 (1973) (holds procedure satisfies each of defendant's constitutional rights, including rights to impartial jury and due process). In addition to complying with the formal confrontational requirements of *Bruton* , the procedure may effectively avoid the "spectacle" of antagonistic defenses. *People v. Brooks*, supra, 92 Mich.App. at 396, 285 N.W.2d at 308.

Besides the courts which generally approve the dual jury procedure, there are courts which have given limited approval to the procedure, suggesting that appropriate guidelines be developed before the procedure is put into common use. *See, e.g. United States v. Sidman*, 470 F.2d 1158, 1170 (9th Cir.1972); *State v. Watson*, 397 So.2d 1337, 1342 (La.1981), cert. denied 454 U.S. 903, 102 S.Ct. 410, 70 L.Ed.2d 222 (1981).

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[138 Ariz. 69] *7 Some other courts have discouraged or disapproved of future use of the procedure, finding the risks of error inherent in the procedure too great. *See, e.g. People v. Williams* (No. 51870, filed 16 April 1982, rev'd on grounds 93 Ill.2d 309, 67 Ill.Dec. 97, 444 N.E.2d 136 (1982); *Scarborough v. State*, 50 Md.App. 276, 278-281, 437 A.2d 672, 674-76 (1981); *State v. Corsi*, 86 N.J. 172, 430 A.2d 210 (1981). The principal risk of this procedure appears to be that while both juries are present, there may be some unintentional disclosure or reference to information admissible against only one defendant which may constitute reversible error. The Illinois Supreme Court stated, "It is the possibility that inadvertent revelations will disclose to the separate juries the inadmissible evidence which concerns us." *People v. Williams*, supra, quoted in *People v. Rainge*, 112 Ill.App.3d 396, 419, 68 Ill.Dec. 87, 102, 445 N.E.2d 535, 550 (1983). This risk is demonstrated by *United States v. Sidman*, supra, in which such an error actually occurred. During trial an inadvertent *Bruton* problem arose when in the presence of both juries the prosecutor was allowed to question a witness regarding a statement of defendant Sidman which incriminated both himself and his co-defendant. Although Sidman's conviction was affirmed, the co-defendant had to be retried.

[1] Although implied authority for a multiple jury procedure has been found under Rule 14, Fed.Rules Crim.P., 18 U.S.C., governing severance of parties and offenses, *United States v. Rowan*, supra, 518 F.2d at 690, and under state rules with similar wording, *People v. Church*, 102 Ill.App.3d 155, 163-165, 57 Ill.Dec. 679, 686-87, 429 N.E.2d 577, 584-85 (1981); *State v. Corsi*, supra, 86 N.J. at 175, 430 A.2d at 212-13, no such authority can be found in the Arizona Rules of Criminal Procedure. Specifically, our rule governing severance, Rule 13.4, Ariz.Rules Crim.P., 17 A.R.S., does not contain explicit authority for such a procedure, nor does it provide trial judges the broad discretion to "provide whatever other relief justice requires" as does the federal rule. Furthermore, our rules do not contain a provision analogous to Rule 57 of the Federal Rules of Criminal Procedure, which grants broad power to "proceed in any manner not inconsistent with these rules * * *." *Cf. United States v. Sidman*, 470 F.2d at 1170 (suggests district courts have authority to establish guidelines for multiple jury procedure under Federal Rule Crim.P. 57).

In *Hare v. Pima County Superior Ct.*, 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982), we recently pointed out,

> Following the adoption of the amended 1960 state constitution, this court was given exclusive power to make rules relative to all procedural matters in any court. Ariz. Const., art. 6, § 5, Subsec. 5, added 1960; *State v. Blazak*, 105 Ariz. 216, 462 P.2d 84 (1969). We have held that this rule-making power may not be supplemented or superseded by a Superior Court. *Anderson v. Pickrell*, 115 Ariz. 589, 566 P.2d 1335 (1977). We reenforced this constitutional position when we adopted Rule 36, Arizona Rules of Criminal Procedure, 17 A.R.S. (1973):
>
> "Any court may make and amend rules governing its practice not inconsistent with these rules. No such rule shall become effective until approved in writing by the Supreme Court."

This rule allows adoption of local rules of practice and procedure, but only with our approval. * * *

We further stated:

> * * * Nothing we say here should discourage courts, through the adoption of local rules, to carry out experiments which may improve the judicial process. Indeed, these efforts should be encouraged. But local rules must first be approved by this court * * *. *Id.* at 543, 652 P.2d at 1390.

It is clear that the "experiment" conducted in the instant case was unauthorized by this court. We thus must consider the question of prejudice to the defendant.

The authorities to date, including those cases which disapprove future use of the multiple jury procedure, are unanimous in refusing to reverse a conviction merely based on the use of this procedure, without some specific showing of prejudice. While [138 Ariz. 70] *8 it has been found that this procedure involves an inherent risk that prejudicial error may occur during the trial, the procedure itself has not been found to be prejudicial. Defendant's conviction has been uniformly upheld where the courts are unable to find any specific prejudice to the defendant. *See United States v. Hays* (11th Cir.), supra; *United States v. Rimar* (6th Cir.), supra; *United States v. Rowan* (6th Cir.), supra; *United States v. Sidman* (9th Cir.),

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supra; *People v. Wardlow* (Cal.App.), supra; *People v. Williams* (Ill.), supra; *People v. Rainge* (Ill.App.), supra; *People v. Church* (Ill.App.), supra; *State v. Watson* (La.), supra; *Scarborough v. State* (Md.App.), supra; *People v. Brooks* (Mich.App.), supra; *State v. Corsi* (N.J.), supra; *State v. Hernandez*, 163 N.J.Super. 283, 394 A.2d 883 (App.Div.1978) (involving three juries). *See also People v. Smith*, 94 Ill.App.3d 969, 50 Ill.Dec. 296, 419 N.E.2d 404 (1981) (finds no prejudice resulted from dual jury procedure, but reverses conviction on other grounds).

Defendant in the instant case can point to no specific error occurring at trial. The trial judge was meticulous in explaining the procedure to the jurors, properly admonishing the jurors, keeping the juries separated, and keeping the juries from being exposed to inadmissible material. Defendant argues that the judge erred in giving the jurors the following explanation for the procedure:

> For some legal reasons the evidence that the State will present, some of the evidence is admissible against Mr. Smith and not against Mr. Lambright; some of the evidence is admissible against Mr. Lambright but not against Mr. Smith.
>
> For that reason you are one of two juries that will be chosen this afternoon.

A substantially similar instruction was given to each jury. Defendant claims this instruction may have caused improper speculation on the part of the jurors. We believe that the above explanation of the procedure was more likely to reduce rather than increase speculation by the jurors. *See also State v. Corsi*, supra, 86 N.J. at 178-179, 430 A.2d at 213 (assertion that dual jury procedure causes speculation in the minds of the jurors rejected as a grounds for reversal). Furthermore, to the extent that through this explanation the jury became aware that there is evidence which they will not hear for legal reasons, we note that this occurs numerous times during the usual criminal trial whenever the judge sustains an evidentiary objection.

The main thrust of defendant's argument is that the dual jury procedure is inherently prejudicial, breeding confusion and speculation in the minds of the jury. We join the overwhelming authority to the contrary, however, and find that the procedure is not inherently prejudicial. In light of the severity of the penalty in this case, we have reviewed the trial record with great care. We find no reversible error in the instant case.

We do not intend the current disposition to be taken as an approval of future use of this procedure. As noted above, because this procedure is unauthorized by our rules, trial courts must obtain the approval of the Supreme Court before conducting further trials in this manner. If proposed guidelines are presented for approval, we will then consider whether they successfully minimize the risks of this procedure while maintaining the benefit of conserving judicial resources.

We note that although courts have utilized the dual jury procedure in other murder cases, *see e.g. People v. Church*, supra; *State v. Corsi*, supra, including one in which the death penalty was given and affirmed, *see People v. Williams*, supra, we feel that death penalty cases are inappropriate vehicles for experimentation with new procedures, and the practice should be avoided in the future.

II. VENUE

Article 2, § 24 of the Arizona Constitution provides, "In criminal prosecutions, the accused shall have the right * * * to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed. * * * " This provision is carried into effect by A.R.S. § 13-109 which specifically provides,

> [138 Ariz. 71] *9 § 13-109. Place of trial
>
> A. Criminal prosecutions shall be tried in the county in which conduct constituting *any element* of the offense or a result of such conduct occurred, unless otherwise provided by law.
>
> B. The following special provisions apply:
>
> 1. If conduct constituting *an element* of an offense or a result constituting an element of an offense occurs in two or more counties, trial of the offense may be held in any of the counties concerned; * * *. (Emphasis added.)

[2] It is clear that the actual killing in this case took place in Pinal County. The defendant argues that venue on the homicide charge was improper in Pima County, where the trial was held.

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The murder charge was based on both premeditation and felony murder theories. As to felony murder, our statute provides,

> § 13-1105. First degree murder; classification
>
> A. A person commits first degree murder if: * * *.
>
> 2. Acting either alone or with one or more other persons commits or attempts to commit sexual assault under § 13-1406, * * * [or] kidnapping under § 13-1304 * * *, and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.

Under this felony murder theory, the underlying felonies of kidnapping and sexual assault were elements of the first degree murder charge. It is clear that the kidnapping of Sandra Owen originated in Pima County. The uncontested evidence demonstrates that Sandra Owen was abducted in the parking lot of a food stamp office in Tucson, Pima County. The only counterargument offered is that Ms. Owen voluntarily got into the automobile when she was first picked up hitchhiking. Under our criminal code,

> A person commits kidnapping by knowingly restraining another person with the intent to
>
> * * *
>
> * * *
>
> 3. Inflict death, physical injury or a sexual offense on the victim, * * *. A.R.S. § 13-1304.

Further, our statutes provide that "Restraint is without consent if it is accomplished by: (a) Physical force, intimidation or deception; * * *." A.R.S. § 13-1301(2)(a). The uncontradicted evidence established that when the car reached the parking lot, Ms. Owen was not permitted to leave the car, but was forced to remain when Lambright jumped into the seat next to her, warned her to "shut up and be quiet and she wouldn't get hurt," and the car sped off with Smith at the wheel. Thus, the kidnapping began in Pima County. In addition, the evidence supports the trial judge's conclusion that the initial sexual assault, which took place while the car was in motion on Interstate 10, occurred while the defendants were still in Pima County. Because acts comprising an element of felony murder occurred in Pima County, venue was proper in Pima County under A.R.S. § 13-109, supra.

Because we have decided that venue was proper under a felony murder theory, we need not decide whether the evidence suggesting premeditation in Pima County was also sufficient to establish venue. *See State v. Poland*, 132 Ariz. 269, 275-76, 645 P.2d 784, 790-91 (1982) (evidence of premeditation in Yavapai County sufficient to support venue under A.R.S. § 13-109). *Cf. State v. Cox*, 25 Ariz.App. 328, 331-32, 543 P.2d 449, 452-53 (1975) (forming of intent did not satisfy "overt act" requirement of former venue statute A.R.S. § 13-131).

III. VOLUNTARINESS OF STATEMENTS

Defendant Lambright was arrested at approximately 9:30 a.m. on 14 March 1981 at his place of work, Midway Auto Sales, located on Highway 62 in Orange County, Texas. The officers involved with the arrest were Thomas Latta, Assistant Chief [138 Ariz. 72] *10 Deputy of the Orange County Sheriff's Department, Bruce Simpson, Captain, Deputy Sheriff of the Orange County Sheriff's Department, Winston Padgett, a detective with the Texas Department of Public Safety who had worked on the investigation, and John Hebert, a Louisiana State Police trooper who had also helped in the investigation. Lambright was properly advised of his Miranda warnings at the time of the arrest, and he indicated he understood them. He was not questioned at that time. The officers transported Lambright to the Orange County Sheriff's Office, where he was booked and then permitted to make phone calls. When he had finished his phone calls, he was interviewed beginning around 10:15 a.m. He spoke to officers Padgett and Simpson for approximately forty-five minutes, and then spoke to officer Hebert for another forty-five minutes. During this period defendant was not handcuffed, and was permitted to smoke cigarettes and drink coffee. He gave a detailed account of the crime, including his participation in it, except that he said he "couldn't remember" who actually wielded the knife.

[3] The trial judge held these statements were voluntary. As we said in *State v. Arnett*, 119 Ariz. 38, 42, 579 P.2d 542, 546 (1978), "[T]he State must show 'by a preponderance of the evidence' that the

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confession was freely and voluntarily made. The trial court must look to the totality of the circumstances surrounding the giving of the confession, as presented at 'voluntariness' hearings, and decide whether the State has met its burden. However, the trial court's determination of admissibility will not be upset on appeal absent clear and manifest error." (Citations omitted.) Quoted in *State v. Osbond*, 128 Ariz. 76, 78, 623 P.2d 1232, 1234 (1981). *Accord State v. Dalglish*, 131 Ariz. 133, 137, 639 P.2d 323, 327 (1982). We are unable to find any clear and manifest error in the instant case. There was nothing inherently coercive regarding these interviews, considering the time of day, duration, number of officers involved, or any other surrounding circumstances.

[4] At the voluntariness hearing Lambright testified that during the drive to the sheriff's office one of the officers conspicuously displayed a gun and said that it could make a big hole in a person. This was specifically denied by each of the police officers who rode in the car with Lambright. Lambright also stated that when he was permitted to telephone his sister and his boss, he asked those persons to arrange to get him a lawyer, and Lambright believed that the officers overheard these requests. Each of the arresting officers denied overhearing any such conversation. Lambright further claimed that at the beginning of the interview he stated that he thought he should talk to an attorney. Officer Padgett, who was the first person to enter the room and began the interview, denied at trial that defendant ever made such a statement. Finally, Lambright claimed that the officers alluded to another case involving multiple defendants and stated that the first person to confess got a better deal. Each of the three officers who interviewed the defendant denied making such a reference or hearing any other officer make such a reference.

After hearing this conflicting testimony the trial judge found these statements were voluntarily given. The trial judge had an opportunity to assess directly the demeanor of the witnesses and determine their credibility. After hearing the witnesses, the trial judge was free to reject the allegations of the defendant in favor of the facts as related by the officers. We are unable to find clear and manifest error in the admission of these oral statements given to the police.

After concluding the oral statements, Lambright was asked if he would make a written statement. He agreed to do so, and was read his rights again. He had just begun to write out a statement when he was interrupted by the arrival of a judge at approximately 12:10 p.m. to secure a waiver of extradition which Lambright had indicated he was willing to give. The judge gave Lambright an additional Miranda warning, and then read him a statement regarding extradition. Lambright then [138 Ariz. 73] *11 asked some complex questions regarding the extradition process. The judge responded that he could not give Lambright legal advice, and without Lambright requesting one, the judge decided to provide Lambright an attorney, and called an attorney on the telephone. After talking with the lawyer, Lambright told the judge and officers present that the attorney had told him not to make any further statements. All questioning ceased, and Lambright was transferred to the County Jail.

[5] After extradition had been arranged, Gary Dhaemers, homicide detective with the Pima County Sheriff's Department, went to Texas in May 1981 to return Lambright to Arizona. Dhaemers told Lambright at the outset that he would not talk to him about the case because Lambright had an attorney. When they arrived in Tucson and were entering the holding area of the court building, Lambright stated to Dhaemers "I probably owe you a complete confession." The trial court properly found this spontaneous remark which was unsolicited and clearly voluntary to be admissible. We find no error in the trial court's determination of the admissibility of his statements to the police.

IV. ASSOCIATE OF PROSECUTOR AS WITNESS

Defendant argues that the trial court erred in allowing a member of the Pima County Attorney's Office to testify. The defendant generally objected to Deputy County Attorney Paul Banales' testimony concerning Kathy Foreman's story of the crime because of "the fear that the jury will consider the testimony of a prosecutor to be more credible than that of the other witness[es]." The context of Banales' testimony here, according to the defendant, renders this fear particularly palpable. Banales testified at trial that Kathy Foreman's story never varied in its particulars before and after he granted her immunity. According to the defendant, Banales' testimony thus had a substantial impact on a key issue in the case--the credibility of the prosecution's eye witness.

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[6][7] The defendant did not object at trial to Banales' specific comment regarding the consistency of Foreman's story, and we do not believe that admitting the comment was error. That Foreman was an interested witness is beyond dispute; her immunity from prosecution was contingent on her testifying against the co-defendants, as the jury was advised. The credibility of a witness and the weight and value to be given her testimony are questions for the trier of fact. *State v. Spoon*, 137 Ariz. 105 at ---, 669 P.2d 83; *State v. Pieck*, 111 Ariz. 318, 529 P.2d 217 (1974). The jury would have considered the conditions under which Foreman testified, as well as Banales' comment, in deciding how much credence to give her testimony. We believe on review of the evidence that Banales' testimony had little impact on a jury that assessed first-hand the credibility of a witness subjected both to direct examination and to searching cross-examination by two defense attorneys. Moreover, the jury knew that Banales was involved in the early stages of the instant proceedings, and had made the offer of immunity. It therefore knew that the "corroboration" implicit in Banales' statement was from a source interested in the outcome of the trial. We believe, therefore, that the jury was able to place Banales' remark in context, and to accord it the appropriate weight.

[8][9] As to the general contention that a prosecutor's testimony is inherently prejudicial to a defendant because of the status of the witness, we have said that the weight and credibility to be accorded to witnesses who are involved in upholding the law are jury matters. *See Baumgartner v. State*, 20 Ariz. 157, 178 P. 30 (1919); *Duff v. State*, 19 Ariz. 361, 171 P. 133 (1918). In the instant case it was not the prosecutor who was trying the case who appeared as a witness, but another person from the same office, who was not participating in the trial. The concerns we have about the county attorney also being a material witness in the crime he is prosecuting do not apply in this case. We find no error.

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*12 V. FAILURE TO GIVE JURY INSTRUCTIONS

The next allegation of error concerns the trial court's failure to give defendant's requested jury instruction no. 10, which read:

> There are two defendants. You must consider the evidence in the case as a whole. However, you must consider the charge against each defendant separately. You must not be prejudiced against one defendant simply because you determine that the State has proved its case against another defendant.

[10][11] The failure to give instructions which are not correct statements of the law or do not fit the facts of a particular case is not error. *State v. Axley*, 132 Ariz. 383, 393, 646 P.2d 268, 278 (1982); *State v. Reinhold*, 123 Ariz. 50, 57, n. 4, 597 P.2d 532, 539, n. 4 (1979); *State v. Rhymes*, 107 Ariz. 12, 14, 480 P.2d 662, 664 (1971). The above instruction to the jury that it "must consider the charge against each defendant separately" was an incorrect statement of the law given the dual jury procedure. The trial judge correctly pointed out that each of the juries in this case were supposed to consider the charges against only one defendant, not to consider the charges against each defendant separately. This instruction was an incorrect statement of the law, had the potential for confusing the jury, and therefore was properly refused.

We also note that the trial judge correctly instructed the jurors,

> The only matter before you for your decision is the guilt or innocence of the particular defendant.

"If the substance of the proposed instruction is adequately covered by instructions actually given by the court, there is no error in their being refused. *State v. Cookus*, 115 Ariz. 99, 563 P.2d 898 (1977)." *State v. Gretzler*, 126 Ariz. 60, 89, 612 P.2d 1023, 1052 (1980). *Accord State v. Melendez*, 121 Ariz. 1, 5, 588 P.2d 294, 298 (1978).

VI. CONSTITUTIONALITY OF ARIZONA DEATH PENALTY STATUTE

[12] Defendant claims that the Arizona death penalty statute, A.R.S. § 13-703, is unconstitutional in that it is cruel and unusual punishment contrary to the eighth amendment. This issue has been resolved adversely to defendant's position on numerous occasions. *State v. Gretzler*, 135 Ariz. 42, 53, 659 P.2d 1, 12, cert. denied 461 U.S. 971, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983). *See also State v. Gillies*, 135 Ariz. 500, 507, 662 P.2d 1007, 1014 (1983); *State v. Woratzeck*, 134 Ariz. 452, 456, 657 P.2d 865, 869 (1982).

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VII. VALIDITY OF STATUTORY AGGRAVATING CIRCUMSTANCE OF "HEINOUS, CRUEL OR DEPRAVED"

[13] Defendant also claims that the statutory aggravating circumstance prescribed by A.R.S. § 13-703(F)(6), killing in an "especially heinous, cruel, or depraved manner," is unconstitutionally vague. We have considered and rejected this claim in prior cases. *State v. Gretzler*, supra, 135 Ariz. at 50, 659 P.2d at 9. *See also State v. Jeffers*, 135 Ariz. 404, 430, 661 P.2d 1105, 1131 (1983); *State v. Zaragoza*, 135 Ariz. 63, 68, 659 P.2d 22, 27 (1983).

VIII. RIGHT TO JURY SENTENCING

[14] Defendant asserts that he has a right to have a jury participate in sentencing when the death penalty is a possible outcome. This assertion has also been rejected by the court numerous times. *State v. Gretzler*, supra, 135 Ariz. at 56, 659 P.2d at 15. *See also State v. Richmond*, 136 Ariz. 312, ---, 666 P.2d 57, 61 (1983).

IX. BURDEN OF PROOF ON MITIGATING CIRCUMSTANCES

[15] Defendant also argues that placing the burden of proof on defendant to prove mitigating circumstances, *see* A.R.S. § 13-703(C), violates due process. Several of our cases hold to the contrary. *State v. Richmond*, supra, 136 Ariz. at 316, 666 P.2d at 61; *State v. Blazak*, 131 Ariz. 598, 602, 643 P.2d 694, 698 (1982); *State v. Smith*, 125 Ariz. 412, 416, 610 P.2d 46, 50 (1980).

[138 Ariz. 75]
*13 X. INDEPENDENT REVIEW

In every case in which the death penalty is imposed we conduct an "independent review of the facts that establish the presence or absence of aggravating and mitigating circumstances." *State v. Richmond*, 114 Ariz. 186, 196, 560 P.2d 41, 51 (citations omitted), cert. denied 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1976). We further "determine for ourselves if the latter outweigh the former when we find both to be present." *Id.*

[16] In the instant case the trial judge found the evidence established the aggravating circumstance set out in A.R.S. § 13-703(F)(6), that the "defendant committed the offense in an especially heinous, cruel, or depraved manner." Cruelty has been specifically defined to involve the infliction of pain on the victims. We have also stated that our concept of cruelty involves not only physical pain, but also mental distress visited upon the victims. *State v. Gretzler*, supra, 135 Ariz. at 52, 659 P.2d at 11. In *State v. Tison*, 129 Ariz. 526, 633 P.2d 335 (1981), we found cruelty based on the infliction of such emotional distress. There the victims were held by armed captors for an extended period, forced at gunpoint to move from place to place, and finally compelled to witness other family members being shot to death while awaiting their own executions. In this case the victim was abducted and driven away from the city in which she was picked up by her captors. She was described as being scared and trembling as she sat in the back seat of the car. During the drive she was sexually assaulted. She was then taken to an isolated location, and placed in obvious fear for her life, as evidenced by her asking her captors if they intended to let her go. She was then sexually assaulted a second time before being killed. As was the case in *State v. Tison*, supra, we are able to find cruelty based on the "great degree of mental pain" inflicted on the victim during the course of this crime. 129 Ariz. at 543, 633 P.2d at 352.

[17] In addition to the mental pain involved, the manner of killing was one which was physically painful to the victim. Ms. Owen was choked and then stabbed in the chest and abdomen. The knife was twisted and turned while it was inside her. Her throat was then cut deeply. After these attacks she remained alive and was still conscious, as she raised herself up on one elbow when her assailants turned to leave. Lambright then returned and threw a large boulder down on her head. The victim, who was conscious during this series of violent attacks, must have suffered great physical pain. The statutory element of cruelty is established.

[18][19][20] The statutory concepts of heinous and depraved go to the mental state and attitude of the perpetrator as reflected in his words and actions. *State v. Poland*, supra, 132 Ariz. at 285, 645 P.2d at 800; *State v. Tison*, supra, 129 Ariz. at 543, 633 P.2d at 352. The evidence also supports a finding that Lambright had a heinous and depraved attitude during this crime. In *State v. Gretzler*, supra, 135 Ariz. at 51-53, 659 P.2d at 10-12, we identified specific factors which lead to a finding that the crime was committed in a heinous and depraved

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manner. One of these factors is the relishing of the murder. In *State v. Clark*, 126 Ariz. 428, 437, 616 P.2d 888, 897, cert. denied 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), we found the murderer had a depraved state of mind where he "kept a spent bullet-as a grisly souvenir of his crime." In the instant case, when the defendant was arrested one year after the murder he was wearing a necklace with a charm that had belonged to Ms. Owen. When the authorities inquired about the charm, Lambright told them he "kept it as a m[e]mento of the trip." A heinous and depraved state of mind is also demonstrated by Lambright's participation in the macabre celebration of the killing during which the group played the song "We Are the Champions." (FN1) As mitigation the defendant [138 Ariz. 76] *14 presents his lack of a record of prior violent crime, an honorable discharge from the military, an asserted unsettled family life as a child, and the fact that Kathy Foreman was granted immunity for her testimony, which is discussed more fully infra. While we have considered all the mitigation suggested by defendant, we do not find it sufficiently substantial to outweigh the aggravating circumstance and to call for leniency. *See* A.R.S. § 13-703(E). The death penalty was properly imposed in this case.

XI. PROPORTIONALITY REVIEW

In addition to conducting an independent review of the propriety of each death sentence, we also conduct a proportionality review to determine "whether the sentences of death are excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *State v. Richmond*, supra, 114 Ariz. at 196, 560 P.2d at 51. *Accord State v. Gretzler*, supra, 135 Ariz. at 58, 659 P.2d at 17.

[21] Our initial inquiry is whether the disposition accorded to Kathy Foreman, who received immunity in return for her testimony against Lambright and Smith creates a disproportionate result. While a more lenient sentence received by an accomplice has been considered along with other mitigating circumstances in determining whether to impose the death penalty, *see State v. Watson*, 129 Ariz. 60, 628 P.2d 943 (1981) (leniency granted to accomplice together with numerous other mitigating circumstances sufficiently substantial to reduce death sentence to life imprisonment), our cases have held that the mere fact that an accomplice has received leniency does not in itself prevent the imposition of the death penalty.

[22] In *State v. Gillies*, supra, where one defendant was tried and received the death penalty, and his accomplice plead guilty and was sentenced to life imprisonment, we noted that, "[a]ny resulting inequity between the two sentences is a consequence induced by our plea-bargaining system." 135 Ariz. at 515, 662 P.2d at 1022. Similarly, in *State v. Gerlaugh*, 135 Ariz. 89, 659 P.2d 642 (1983), in which defendant Gerlaugh was also tried and sentenced to death, it was noted that the charges against an accomplice were disposed of through a comprehensive plea agreement under which he was given life sentences on some of the charges together with a twenty-one year sentence on another charge. 135 Ariz. at 91, n. 1, 659 P.2d at 644, n. 1 (concurring opinion). More directly on point, in *State v. Richmond*, supra, another death penalty case, we specifically considered the fact "that both Rebecca Corella and Faith Erwin were involved in the crime but were never charged." 136 Ariz. at 320, 666 P.2d at 65. In none of the above cases did we find that the prosecutorial discretion exercised toward other participants in the crime rendered improper the particular defendant's death sentence. Although Foreman managed to escape prosecution by offering her testimony in return for immunity, we note that the other person brought to trial in this case, Robert Smith, has been given the same sentence received by Lambright. While the disposition of other persons involved in the crime is an important factor in determining the proportionality of a capital sentence, the court must also consider the propriety of the sentence in relation to the disposition of persons involved in other similar crimes.

[23] Having reviewed other crimes involving the same aggravating circumstance found in the instant case, we find that the death sentence received by defendant Lambright is proportional to the disposition of the persons involved in those crimes. In *State v. Jeffers*, supra, *State v. Bishop*, 127 Ariz. 531, 622 P.2d 478 (1980), *State v. Ceja*, 126 Ariz. 35, 612 P.2d 491 (1980), *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978), each of the defendants was convicted of a murder in which the sole [138 Ariz. 77] *15 aggravating circumstance was that the crime was found to have been committed in an especially heinous, cruel, or depraved manner under A.R.S. § 13-703(F)(6), and each received the death penalty.

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We find also that Lambright's sentence is not disproportionate to other cases in which this court has held that leniency was appropriate in light of more compelling mitigating circumstances than are present here. *See State v. McDaniel,* 136 Ariz. 188, 665 P.2d 70 (1983) (defendant did not intend to kill); *State v. Graham,* 135 Ariz. 209, 660 P.2d 460 (1983) (substantial mental impairment due to medically-induced drug addiction, neurological problems, and brain damage; vulnerability to influence; lack of prior record of violence); *State v. Valencia,* 132 Ariz. 248, 645 P.2d 239 (1982) (extreme youth of defendant--sixteen years old at the time of his crime); *State v. Watson,* 129 Ariz. 60, 628 P.2d 943 (1981) (convincing evidence of change of defendant's character and goals while in prison; youth of defendant; murder occurred as the result of a shootout begun by robbery victim); *State v. Brookover,* 124 Ariz. 38, 601 P.2d 1322 (1979) (substantial mental impairment due to brain lesion).

[24] While we believe that overall considerations of proportionality favor imposition of the death penalty in this case, we are disturbed by the treatment accorded Kathy Foreman. After viewing the evidence and hearing the testimony in this case, the trial judge concluded that Kathy Foreman was "equally guilty" with Smith and Lambright. By her own admission she assisted Smith and Lambright in restraining the victim when the car was stopped briefly, and she held one of the victim's arms while she was being stabbed. Furthermore, it does not appear the information she had to offer was unique or essential. At the time she was granted immunity Lambright and Smith were already in custody for these crimes, and each had confessed. (FN2) Foreman did agree to try to lead authorities to the victim's body, but each of the other participants had already demonstrated a similar willingness by drawing maps for authorities to use in their search. After reviewing the record in this case the trial court stated that the granting of complete immunity to Kathy Foreman was "appalling." We agree. We must remind prosecuting attorneys that the favorable treatment accorded to an accomplice can, under different facts, be given weight in considering the proportionality of a capital sentence.

We have reviewed the record for fundamental error pursuant to A.R.S. § 13-4035, and find none.

The convictions and sentences are affirmed.

HOLOHAN, C.J., GORDON, V.C.J., and HAYS, J., concur.

FELDMAN, Justice, specially concurring.

I concur with the result and with much of the reasoning contained in the opinion. I write because I disagree with the court's conclusion that the use of dual juries was equivalent to the adoption of a local rule without sanction of this court.

This record contains no hint that the Superior Court of Pima County has adopted a general procedure to be applied in cases with " *Bruton* problems" or in similar cases where the objective of efficient and prompt administration of justice conflicts with the necessity of providing defendants with a fair trial. The record does indicate that the trial judge correctly concluded that defendant's right to a fair trial required a severance. However, he was informed that if the two cases were severed, each trial would consume approximately three weeks and that the prosecution intended to call several out-of-state witnesses. Thus, successive trials would have resulted in a disproportionate expenditure of court, witness and jury time, with the attendant expense and inconvenience.

[138 Ariz. 78] *16 To handle this problem, the judge decided to sever the cases but to hold both trials at once, with two separate juries in the same courtroom. As the majority correctly indicates, careful precautions were taken and neither defendant was prejudiced in any manner. I see no reason to chastise the trial judge for using the procedure, nor any ground to conclude that he made some special rule of local procedure without sanction of the supreme court. More importantly, I see no reason to inhibit other trial judges from using innovative techniques when required in a particular case in order to meet the ever-growing problems of the system.

Rule 36, Rules of Criminal Procedure, 17 A.R.S. (1973), should be interpreted to require advance consent by this court only for the adoption of "rules of court" which set standards of procedure to be aplied to all cases or to all cases of certain classes. "A rule of court prescribes a procedural course of conduct that litigants are required to follow, the failure to comply with which may deprive the parties of substantial rights." *Hare v. Superior Court,* 133 Ariz. 540, 542, 652 P.2d 1387, 1389 (1982). What we have here is not a rule of procedure for litigants; it is an order--the exercise of an individual judge's

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discretion to use a particular technique in order to meet a specific problem. In my view, where the trial judge innovates in accommodating the requirements of a particular case, we are dealing with a discretionary function rather than with "rule making." Trial judges have inherent power and discretion to adopt special, individualized procedures designed to promote the ends of justice in each case that comes before them. *Schavey v. Roylston,* 8 Ariz.App. 574, 575, 448 P.2d 418, 419 (1968) (Judge had inherent power to exclude spectators even though the rule permitting this had been repealed.), 20 Am.Jur.2d. Courts § § 79 and 81. Such discretion--and thus the procedure adopted in the case at bench--is expressly recognized by Rule 611, Rules of Evidence, 17A A.R.S., which permits the trial court to "exercise reasonable control over the mode [of] ... presenting evidence so as to ... avoid needless consumption of time ...."

The court of appeals recently considered a procedure followed by a judge who allows jurors to submit questions for witnesses. *State v. LeMaster,* 137 Ariz. 159, 669 P.2d 592 (App.1983). The court approved the procedure--properly in my view--even though it applied to all cases that come before the judge in question and is, therefore, much more of a "rule" than the "one-time" procedure followed in the case at bench. It was not and has never been suggested that a trial judge must get the approval of this court before deciding whether or how to allow jury questions to witnesses. The same may be said of methods of settling jury instructions, handling motions *in limine,* conducting pretrial conferences, holding settlement discussions, regulating argument, handling objections and numerous other aspects of trial procedure. In fact, no procedure exists whereby a trial judge can obtain the opinion of this court, in advance, before using some technique which, although not prohibited, is not expressly permitted by rule.

The inherent discretion of each trial judge to control his or her own courtroom is one of the strong points of the common law. Of course, we must draw the line where a trial judge institutes procedures contrary to the rules or inconsistent with their spirit. At the same time, we must leave the trial judge free to adopt procedures and techniques for individual cases which present problems not specifically covered by the rules. I believe that this court should support such efforts and that the position taken today is a step backward.

(FN1.) Because of the strong evidence cited above reflecting Lambright's heinous and depraved attitude toward the killing, we need not also rely on Foreman's uncorroborated testimony that Lambright stated before the crime he "would like to kill somebody just to see if he could do it," and said "Die, bitch" as he threw the rock on the victim's head.

(FN2.) We are also unable to find circumstances surrounding these confessions which would cause a prosecutor substantial concern over their admissibility.

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APPENDIX G

Order of Pima County Superior Court Denying Third Petition For Post-Conviction Relief Dated October 24, 1995

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. MICHAEL BROWN CASE NO. CR-05669

Court Rptr: NONE DATE DECEMBER 20, 1995

THE STATE OF ARIZONA

vs.

ROBERT DOUGLAS SMITH

Defendant(s)

EVENT SUMMARY

Type: IN CHAMBERS Result: Defendant's Motion for Rehearing - Denied

MINUTE ENTRY

IN CHAMBERS

Counsel's assertion on page 4, lines 3 through 6 of his Motion for Rehearing, that "each of the deputies of the Public Defender's Office have been appointed . . . to 'conduct the affairs' of the Pima County Public Defender's Office rather than to independently represent Mr. Smith is either outrageous or ridiculous, whichever adjective is most appropriate. Deputies in the Public Defender's Office do not represent the Public Defender's Office. They are attorneys for and have an attorney-client relationship with the actual defendant charged with the crime. It may, indeed, be correct that it would be inappropriate for a public defender to allege a different public defender was ineffective at trial (although it has been done by this Public Defender's Office in the past). However, this does not absolve an attorney representing a client

in an appellate matter from examining in detail whether or not there is a colorable claim for ineffective assistance of counsel. That is an absolute and undelegable duty. Failure to do so is at the very best malpractice and malfeasance. An attorney who discovers a colorable claim of ineffective assistance of counsel must immediately withdraw, notify the Court that there is such a claim, and allow the Court to appoint an attorney who has no conflict in representing that client. To suggest that one could wait for ten years, from 1985 to the present, and never even examine the case to see if the client had such a claim is an admission of the grossest malpractice.

IT IS HEREBY ORDERED Defendant's Motion for Rehearing is denied.

Copies to:

Hon. Michael Brown
Criminal Calendar
S. Jonathan Young, Esq.
John Palumbo, Esq., Public Defender's Office
Eric J. Olsson, Asst. Attny. General
Pima County Attorney's Office

Judy Cyr, Deputy Clerk

APPENDIX H

Order of Pima County Superior Court Denying Motion for Rehearing of Denial Of Third Petition For Post-Conviction Relief Dated December 20, 1995

ARIZONA SUPERIOR COURT, PIMA COUNTY

Honorable Michael J. Brown
JUDGE

CASE NO. CR-05669

DATE October 24, 1995

Court Rptr: None

STATE OF ARIZONA

Plaintiff

vs.

ROBERT DOUGLAS SMITH

Defendant

EVENT SUMMARY

Type: in chambers ruling re Rule 32 petition
Result: completed

MINUTE ENTRY

IN CHAMBERS RULING RE RULE 32 PETITION:

Defendant nor counsel are present.

This is defendant Smith's third Rule 32 petition from a sentence imposed on May 27, 1982 and affirmed by the Supreme Court on September 23, 1983.

The Court has duly reviewed the petition, response, reply, files and records and, disregarding defects of form, it determines that no material

issue of fact or law exists which would be served by any further proceedings. Therefore,

IT IS ORDERED dismissing the petition.

This order is based on the following findings:

The suggestion that Lawrence Fleischman (now Judge Fleischman) or John Palumbo of the Public Defender's office failed to consider the issue of ineffective assistance of counsel, or considered it, thought counsel was ineffective and failed to allege same to avoid embarrassing a professional colleague in violation of their ethical duties is outrageous.

The claims are so old they are (1) precluded by failure to bring them previously, in accordance with Rule 32.2(a) and/or (2) for those claims raised under Rules 32.1(e), 32.1(f) or 32.1(g), are summarily dismissed due to the petition's failure to set forth the reason for not raising such claims in a previous petition or in a timely manner, in accordance with Rule 32.2(b).

cc:
Hon. Michael J. Brown
Court Adminsitrator
County Atty's Office
S. Jonathan Young, Esq.
Public Defender - John Palumbo
Appeals

L. McCormick, Deputy Clerk

(11)

No. 01–339

IN THE
SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, et al.,
PETITIONERS,

-vs-

ROBERT DOUGLAS SMITH,
RESPONDENT.

STATEMENT OF MAILING
AFFIDAVIT OF SERVICE

REPLY BRIEF

JANET NAPOLITANO
ATTORNEY GENERAL

KENT E. CATTANI
CHIEF COUNSEL
CAPITAL LITIGATION SECTION
(COUNSEL OF RECORD)
1275 WEST WASHINGTON
PHOENIX, ARIZONA 85007-2997
TELEPHONE: (602) 542-4686

ATTORNEYS FOR PETITIONERS

AFFIDAVIT

STATE OF ARIZONA }
County of Maricopa } ss.

KENT E. CATTANI, being first duly sworn upon oath, deposes and says:

That he is a member in good standing of the United States Supreme Court Bar.

That on October 9, 2001, he caused to be deposited for delivery by Federal Express, 40 copies of the REPLY BRIEF in TERRY L. STEWART, ET AL., vs. ROBERT DOUGLAS SMITH, No. 01–339, addressed to:

THE HONORABLE WILLIAM K. SUTER
United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

and caused to be deposited in a United States Post Office, first-class postage prepaid, three (3) additional copies addressed to:

JOHN F. PALUMBO
Pima County Public Defender
32 North Stone, 4th Floor
Tucson, Arizona 85701
520–740–5276
Attorney for RESPONDENT

S. JONATHAN YOUNG
177 North Church Avenue, Suite 815
Tucson, Arizona 85701
520–628–7777
Attorney for RESPONDENT

That to his knowledge the mailing of the REPLY BRIEF took place on October 9, 2001. All parties required to be served have been served.

Kent E. Cattani
KENT E. CATTANI

SUBSCRIBED AND SWORN to before me this 9th day of October, 2001.

Janet E. Dyer
NOTARY PUBLIC

My Commission Expires:
Dec. 10, 2001

OFFICIAL SEAL
JANET E. DYER
NOTARY PUBLIC-ARIZONA
MARICOPA COUNTY
My Comm. Expires Dec. 10, 2001

NO. 01-339

In the

Supreme Court of the United States

♦

TERRY L. STEWART, DIRECTOR,
ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

ROBERT DOUGLAS SMITH,

Respondent.

PROOF OF SERVICE

I, S. Jonathan Young, do swear or declare that on this date, September 26, 2001, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

Kent E. Cattani
Assistant Attorney General
1275 West Washington
Phoenix, AZ 85007-2997
(602) 542-4686
Attorney for Petitioner Terry L. Stewart

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 26, 2001

RECEIVED
SEP 27 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

S. Jonathan Young

01-339

IN THE

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, Director,
Arizona Dept. of Corrections, ***Petitioner***,

vs.

ROBERT DOUGLAS SMITH, ***Respondent***.

CERTIFICATE OF SERVICE

I, Kent S. Scheidegger, a member of the Bar of this Court, hereby certify that on this 26th day of September, 2001, three copies of the Motion for Leave to File and Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in Support of the Petition for Writ of Certiorari in the above-entitled case were mailed first-class postage prepaid to:

Mr. Kent E. Cattani
Chief Counsel
Capital Litigation Section
1275 West Washington
Phoenix, AZ 85007-2997
(602) 542-4686
Counsel for Petitioner

Mr. S. Jonathan Young
177 North Church Avenue, Suite 815
Tucson, AZ 85701
(520) 628-7777
Counsel for Respondent

I further certify that all parties required to be served have been served.

KENT S. SCHEIDEGGER
2131 L Street
Sacramento, California 95816
(916) 446-0345
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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SUPREME COURT, U.S.

(12)

SUPREME COURT OF THE UNITED STATES

TERRY L. STEWART, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS *v.* ROBERT DOUGLAS SMITH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01–339. Decided June 28, 2002

PER CURIAM.

At issue in this case is whether, when an Arizona Superior Court denied respondent's successive petition for state postconviction relief because respondent had failed to comply with Arizona Rule of Criminal Procedure 32.2(a)(3) (West 2000), the state court's ruling was independent of federal law. The Court of Appeals for the Ninth Circuit thought not. We granted certiorari and certified to the Arizona Supreme Court a question concerning the proper interpretation of Rule 32.2(a)(3). We have received a response and now reverse the Ninth Circuit's decision.

I

Respondent, Robert Douglas Smith, was convicted in Arizona in 1982 of first-degree murder, kidnapping, and sexual assault. He was sentenced to death on the murder count and to consecutive 21-year prison terms on the other counts. After a series of unsuccessful petitions for state postconviction relief, respondent filed a federal petition for a writ of habeas corpus under 28 U. S. C. §§2241 and 2254 in the United States District Court for the District of Arizona. The petition alleged, among other things, that respondent's Sixth Amendment right to counsel had been violated because his trial counsel had provided ineffective assistance during the sentencing phase of his trial.

Respondent had previously brought this ineffective-assistance claim in a 1995 petition for state postconviction

relief pursuant to Ariz. Rule Crim. Proc. 32. The Pima County Superior Court denied the claim, finding it waived under Rule 32.2(a)(3) because respondent had failed to raise it in two previous Rule 32 petitions. The state court rejected respondent's contention that his procedural default was excused because his appellate and Rule 32 attorneys suffered from a conflict of interest between their responsibility toward respondent and their allegiance to the Public Defender's office, of which respondent's trial counsel was also a member.

The District Court relied on the Pima County Superior Court's procedural ruling on respondent's ineffective-assistance-of-trial-counsel claim to bar federal habeas relief. Like the state court, the District Court rejected respondent's argument that his appellate and Rule 32 counsel suffered from a conflict of interest which excused his procedural default. The Court of Appeals for the Ninth Circuit reversed, finding that although the state court's procedural default ruling was regularly followed and therefore adequate, see 241 F. 3d 1191, 1195, n. 2 (2001) (citing *Johnson* v. *Mississippi*, 486 U. S. 578, 587 (1988)), the ruling required consideration of the merits of respondent's claim and was therefore not independent of federal law, see 241 F. 3d, at 1196–1197. Rule 32.2(a)(3) applies different standards for waiver depending on whether the claim asserted in a Rule 32 petition is of "sufficient constitutional magnitude." If it is, the rule requires that the waiver be "knowin[g], voluntar[y] and intelligen[t]," not merely omitted from previous petitions. Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000). The Ninth Circuit opined that, at the time the state court ruled on respondent's ineffective-assistance claim, the determination of whether a claim is of sufficient magnitude required consideration of the merits of the claim. See 241 F. 3d, at 1197 (citing *State* v. *French*, 198 Ariz. 119, 121, 7 P. 3d 128, 130 (App. 2000); *State* v. *Curtis*, 185 Ariz. 112, 115, 912 P. 2d 1341, 1344 (App. 1995)). The Ninth Circuit concluded that, under *Ake* v. *Oklahoma*, 470 U. S. 68, 75 (1985), the state court's ruling did not bar federal review of the merits of respondent's claim. See 241 F. 3d, at 1196–1197. We granted certiorari to review the Ninth Circuit's decision. 534 U. S. 157 (2001) *(per curiam)*.

II

Because we were uncertain about the proper interpretation of Rule 32.2(a)(3), we certified the following question to the Arizona Supreme Court:

> "At the time of respondent's third Rule 32 petition in 1995, did the question whether an asserted claim was of 'sufficient constitutional magnitude' to require a knowing, voluntary, and intelligent waiver for purposes of Rule 32.2(a)(3), see Ariz. Rule Crim. Proc. 32.2(a)(3), comment (West 2000), depend upon the merits of the particular claim, see *State* v. *French*, 198 Ariz. 119, 121–122, 7 P. 3d 128, 130–131 (App. 2000); *State* v. *Curtis*, 185 Ariz. App. 112, 115, 912 P. 2d 1341, 1344 (1995), or merely upon the particular right alleged to have been violated, see *State* v. *Espinosa*, 200 Ariz. 503, 505, 29 P. 3d 278, 280 (App. 2001)?" 534 U. S., at 159.

We received the following reply:

> "We hold that at the time of respondent's third Rule 32 petition in 1995, the question whether an asserted claim was of 'sufficient constitutional magnitude' to require a knowing, voluntary and intelligent waiver for purposes of Rule 32.2(a)(3), see Comment to 32.2(a)(3), depended not upon the merits of the particular claim, but rather merely upon the particular right alleged to have been violated." *Stewart* v. *Smith*, ___ Ariz. ___, ___, 46 P. 3d 1067, 1068 (2002) (en banc).

Per Curiam

The Arizona Supreme Court's reply makes clear that Rule 32.2(a)(3) does not require courts to evaluate the merits of a particular claim, but only to categorize the claim. According to the Arizona Supreme Court, courts must evaluate whether "at its core, [a] claim implicates a significant right that requires a knowing, voluntary, and intelligent waiver." *Id.*, at ___, 46 P. 3d, at 1071. Courts need not decide the merits of the claim, *i.e.*, whether the right was actually violated. They need only identify what type of claim it is, and there is no indication that this identification is based on an interpretation of what federal law requires. See *Delaware* v. *Prouse*, 440 U. S. 648, 652–653 (1979).

Our cases make clear that "when resolution of [a] state procedural law question depends on a federal constitutional ruling, the state-law prong of the court's holding is not independent of federal law, and our [direct review] jurisdiction is not precluded." *Ake*, *supra*, at 75. Even assuming that the same standard governs the scope of a district court's power to grant federal habeas relief as governs this Court's jurisdiction to review a state-court judgment on direct review, see *Coleman* v. *Thompson*, 501 U. S. 722, 729–732, 741 (1991), Rule 32.2(a)(3) determinations are independent of federal law because they do not depend upon a federal constitutional ruling on the merits. The District Court properly refused to review respondent's ineffective-assistance-of-trial-counsel claim. The Ninth Circuit erred in holding otherwise.

Even though Rule 32.2(a)(3) does not require a federal constitutional ruling on the merits, if the state court's decision rested primarily on a ruling on the merits nevertheless, its decision would not be independent of federal law. The Ninth Circuit interpreted the state court's order rejecting respondent's ineffective-assistance-of-trial-counsel claim as possibly resting on a ruling on the merits of the claim. The record, however, reveals no such ruling.

Per Curiam

The state court did not even reach the merits of respondent's ineffective-assistance-of-trial-counsel claim, finding it waived because respondent had failed to raise it in prior petitions for postconviction relief. As an excuse, respondent asserted that his prior appellate and Rule 32 counsel, who were members of the Arizona Public Defender's office, had refused to file the claim because his trial counsel was also a member of the Public Defender's office. The state court did not find this excuse sufficient to overcome respondent's procedural default. See App. H to Pet. for Cert. The state court explained that, because deputies in the Public Defender's office represent their clients and not their office, respondent's appellate lawyers would never have allowed "a colorable claim for ineffective assistance of counsel" to go unstated. *Id.*, at 2. The Ninth Circuit read the reference to a "colorable claim" as a conclusion that respondent's claim that his trial counsel had rendered ineffective assistance lacked merit, that is, as a comment on the merits of respondent's underlying claim. 241 F. 3d, at 1197. In context, however, it is clear that the reference to "colorable claim" was used only as a rhetorical device for emphasizing the lack of any conflict of interest that might excuse respondent's waiver.

Because the state court's determination that respondent waived his ineffective-assistance-of-counsel claim under Ariz. Rule Crim. Proc. 32.2(a)(3) did not require an examination of the merits of that claim, it was independent of federal law. We voice no opinion on whether respondent has provided valid cause to overcome his procedural default in state court. The Ninth Circuit's judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.